No. 95-386-CSX
Status: GRANTED

Title: Jason Richards, et al., Petitioners
v.
Jefferson County, Alabama, et al.

Docketed:
September 7, 1995

Court: Supreme Court of Alabama

Counsel for petitioner: Baxley,William J.

Counsel for respondent: Slaughter,William M.

Ptn due & mld 9-7-95, see ml label re dkt dt.

Entry	Date	Note	Proceedings and Orders
1	Sep 7 1995	G	Petition for writ of certiorari filed.
4	Oct 6 1995		Order extending time to file response to petition until October 17, 1995.
2	Oct 10 1995		Brief of respondent Jefferson County, Alabama in opposition filed.
5	Oct 16 1995		This extension is granted for all respondents.
7	Oct 16 1995		Order further extending time to file response to petition until October 24, 1995.
8	Oct 16 1995		This extension is granted for all respondents.
6	Oct 23 1995		Reply brief of petitioners filed.
9	Oct 24 1995		Brief of respondent Birminghan-Jefferson Civic Center Authority in opposition filed.
10	Nov 1 1995		DISTRIBUTED. November 22, 1995 (Page 2)
11	Nov 22 1995		Petition GRANTED.
			**********
12	Jan 8 1996		Joint appendix filed.
13	Jan 8 1996		Brief of petitioners Jason Richards and Fannie Hill filed.
14	Jan 24 1996		SET FOR ARGUMENT TUESDAY, MARCH 26, 1996. (1ST CASE).
15	Jan 29 1996		CIRCULATED.
16	Feb 2 1996		Record filed.
		*	Certified record proceedings Supreme Court of Alabama and Circuit Court of Jefferson County, Alabama.
17	Feb 8 1996	G	Motion of National Association of Counties, et al. for leave to file a brief as amici curiae filed.
18	Feb 12 1996	X	Brief of respondents Jefferson County, Alabama, et al. in opposition filed.
19	Feb 12 1996	X	Appendix of respondent filed.
20	Mar 4 1996		Motion of National Association of Counties, et al. for leave to file a brief as amici curiae GRANTED.
21	Mar 15 1996		The writ of certiorari is dismissed as improvidently granted to the extent that it includes the question whether the occupational tax challenged by petitioners violates the Equal Protection Clause of the United States Constitution. The parties are directed to address at oral argument only the remaining question: whether the Due Process Clause of the United States Constitution prohibits the application of res judicate in this case.
22	Mar 18 1996	X	Reply brief of petitioners filed.
23	Mar 26 1996		ARGUED.

Supreme Court, U.S.
FILED

(1) 95 386 SEP 7 1995

OFFICE OF THE CLERK

NO._____

IN THE

Supreme Court Of The United States

OCTOBER TERM 1995

JASON RICHARDS and FANNIE HILL,

Petitioners,

v.

JEFFERSON COUNTY, ALABAMA and BIRMINGHAM-JEFFERSON CIVIC CENTER AUTHORITY,

Respondents.

PETITION FOR WRIT FOR CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF OF PETITIONER

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83 pp

QUESTIONS PRESENTED FOR REVIEW

I.

Can Alabama, by interpretation of its state case law pertaining to res judicata, deny plaintiffs' never-before-presented, and never-before-heard, federal constitutional claims without denying them due process of law and equal protection of the laws?

We contend that it cannot, and that the Alabama Supreme Court's reversal of a trial court's order denying summary judgment below — unless reversed by this Honorable Court, after a grant of the writ — will effectively deny these plaintiffs any opportunity to ever be heard upon meritorious federal constitutional claims.

II.

Does the convoluted exemption scheme described in Alabama Justice Maddox' dissenting opinion — attacked by plaintiffs for the first time ever in the case at bar — warrant reversal of the Alabama Supreme Court's decision in the case at bar, after a grant of the writ, on federal equal protection and due process grounds?

We contend that it does.

CERTIFICATE OF INTERESTED PERSONS

Respondents' Counsel	Edwin A. Strickland Charles S. Wagner Jeffrey M. Sewell William Slaughter Charlie D. Waldrep Thomas L. Stewart
Petitioners' Counsel	William J. Baxley Joel E. Dillard
Respondents	Jefferson County, Alabama Birmingham-Jefferson Civic Center Authority
Trial Judge	Hon. John Rochester
Petitioners	Jason Richards Fannie Hill and a class of similarly situated persons
Supreme Court of Alabama	Hon. Sonny Hornsby Hon. Hugh Maddox Hon. Reneau Almon Hon. Janie L. Shores Hon. J. Gormon Houston Hon. Mark Kennedy Hon. Kenneth F. Ingram Hon. Ralph Cook Hon. Terry Butts

No other persons are known to have participated directly or indirectly in the appeal of this matter.

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STATEMENT OF GROUNDS OF JURISDICTION

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254 because this Petition is from a decision of the Supreme Court of Alabama in a civil case.

(i) Date of the decision: March 31, 1995

(ii) Application for Rehearing Overruled: June 9, 1995

(iii) No cross petition has been filed

(iv) Jurisdiction is based on 28 U.S.C. § 1254(1) and Rule 10.1(c) of the Rules of the Supreme Court.

STATEMENT OF THE CASE

(1) Nature of Case, Course of Proceedings and Disposition

On May 20, 1988 the Alabama Supreme Court decided *Bedingfield v. Jefferson County*, 527 So.2d 270 (Ala. 1988), rejecting three separate challenges to the county occupational tax here in issue on state law grounds. The same three state law issues had been decided adversely to the challengers in a state trial court, prompting that appeal. (R. 265-269). *Bedingfield, supra*, was not a class action, and did not decide any federal question in the trial or appellate court.

On April 21, 1992 Jason Richards and Fannie Hill filed a class action complaint in state court, attacking the exemption scheme built into the same county occupational tax, and claiming that the exemption scheme denied them due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, and under parallel provisions of the Constitution of Alabama.

A motion for summary judgment, based upon a defense of res judicata, claimed to result from the *Bedingfield* decision, was filed in the trial court on June 4, 1992.

On April 8, 1993 Jefferson County was granted summary judgment upon all state law claims, but summary judgment was denied as to petitioners' federal constitutional claims. (R 392-394) Jefferson County and an intervenor tax recipient, Birmingham-Jefferson Civic Center Authority, appealed the trial court's denial of summary judgment upon federal constitutional claims to the Alabama Supreme Court. (R. 425-428).

The Alabama Supreme Court reversed the trial court on March 31, 1995 and overruled an application for rehearing June 9, 1995.

(II) Statement of Facts with References to Record

In *Bedingfield*, which appears in the appendix as well as the record on appeal, the Alabama Supreme Court decided that Jefferson County Ordinance 1120 — the occupational tax here in issue — was not illegal because (1) a statute authorized the county to levy the occupational tax (2) the statute was general, rather than local legislation, and (3) the statute authorizing levy of the tax provided also for its collection. (R 231-235). Neither the trial court's decision in that case nor the decision of the Supreme Court of Alabama in that case contained any reference to whether the Act and the county ordinance violated any provision of the Federal Constitution. (R. 231-235, 265-269). Neither addressed nor decided the validity of the exemption scheme built into the tax. (R. 232-235, 265-289).

The county taxing ordinance appears in the appendix and the record (R. 30-31).

Jason Richards, a law firm courier and Fannie Hill, a domestic servant employed in commercial buildings, represent a sub-class of claimants who subsequently attacked the county taxing ordinance on behalf of themselves and all other non-federal employees who pay the tax. (R. 1-18) (Federal employees subject to the tax comprise yet

another separate sub-class which is not involved in this appeal). Richards' and Hill's complaint appears in the appendix and the record on appeal. (R. 1-18). They specifically claim "this action involves a violation of federal law for which 42 U.S.C. § 1983 provides a remedy" (R. 2), and allege that "[t]he occupational tax by its terms, and in actual practice, exempts from its levy, collection and payment businesses and vocations or occupations listed at Chapter 12, Article 2, Title 40, Code of Ala. 1975, as amended, which range from attorneys, certified public accountants, dentists and physicians to blueprint makers, casket manufacturers, pig iron storage operators, lightning rod installers and snuff retailers, and it includes a specific exemption for domestic servants in private homes." (R. 8) A complete list of exempted persons appears in the text of our argument, and in the dissent to the decision of the Alabama Supreme Court to which this petition is directed. Richards and Hill go on to complain that "[b]y its terms and in actual practice, it taxes all federal employees, including all United States District Judges in the Northern District of Alabama, all Circuit, District and Probate Judges in Jefferson County, and an array of other occupations, including couriers, secretaries, skilled and unskilled laborers, police officers, business executives, teachers and domestic servants not employed in private homes." (R. 8) Richards and Hill complain that "the net effect, dollarwise, of the occupational tax is an absurdity which allows, by way of example, physicians and attorneys earning hundreds of thousands of dollars a year to pay a license fee of $150.00 or less and avoid the occupational tax — which would otherwise be levied at more than ten times the amount of the license fee paid by these high income professionals" (R. 9) and conclude that "[t]he array of persons subject to the tax, on its face and in actual practice, is arbitrary and capricious, and discriminatory in a manner which defies logic

and . . . [t]he array of persons subject to the occupational tax, and the concomitant disparity in taxes paid by and between occupations in Jefferson County, Alabama which fall within and without the burden of the occupational tax render it irrational, unduly burdensome, and violative of the equal protection clause and the due process clause of the Fourteenth Amendment to the Constitution of the United States." (R. 9) Finally, they claim "the occupational tax is so arbitrary and irrational, as described herein, as to violate the due process clause of the Fourteenth Amendment to the Constitution of the United States, both on its face and in its application to both classes of taxpayers bringing this action." (R. 14.)

As the dissenting opinion of the Alabama Supreme Court in the case at bar makes clear, no claim remotely similar to these was presented to, heard by, or decided by either the trial court or the Alabama Supreme Court in *Bedingfield, supra.* (R. 231-235, 265-269).

ARGUMENT

(I) Scope of Review

Richards and Hill, who are not members of a suspect or quasi-suspect class, must establish that the exemption scheme attacked here as violative of the Fourteenth Amendment fails this Honorable Court's "minimum rationality" test for tax exemptions. *Hooper v. Bernalillo County Assessor,* 472 U.S. 612 (1985).

(II) Amplification of Reasons for Allowance of Writ

A. Petitioners' Federal Claims should Not Have Been Precluded

In *Martin v. Wilks,* 490 U.S. 755 (1989) this Honorable Court held that parties who are neither designated as parties nor served with process in prior litigations which proceed to judgments are not precluded from pursuing

subsequent, independent claims of unlawful discrimination under the United States Constitution. In *Martin, supra,* Justice Rehnquist, writing for a majority of this Honorable Court, stated the exact principle of law which applies to the claims of Richards and Hill: "Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subject to the jurisdiction of the court and bound by a judgment or decree." 490 U.S., at 765.

In reaching this conclusion, Justice Brandeis' wisdom from *Chase National Bank v. Norwalk,* 291 U. S. 431 (1934), was invoked:

> "The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger... Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights." *Id.,* at 441.

This appears elementary, particularly in a state like Alabama, which has adopted rules of civil procedure which are virtually a mirror image of the Federal Rules of Civil Procedure. Yet, this fundamental right of any litigant was trammelled by the logic of the Alabama Supreme Court in the case at bar.

Bedingfield, supra, was not a class action. The *Bedingfield* plaintiffs did not purport to represent anyone but themselves, and they neither presented nor had decided any federal constitutional claims. Indeed, the *Bedingfield* action was not only a state law test of the legality of the occupational taxing ordinance and its enabling legislation, but was also filed and decided before collection of the tax began. If Richards and Hill had tried to intervene in *Bedingfield* to protest its exemption scheme, they would have lacked standing. It would have been impossible for

them to complain about exemptions when no one – themselves included – was paying the tax.

Simply stated, a majority of the Alabama Supreme Court chose to ignore the legal rights of Richards and Hill to have their day in court upon the irrationality of the occupational tax's exemption scheme, preferring to analyze their effort so to do as if they were privies of the *Bedingfield* plaintiffs, and as if the *Bedingfield* plaintiffs had presented federal constitutional claims which had been decided adversely by the Alabama trial and appellate courts. The record on appeal refutes that analysis. It invites application of *Martin, supra*, and its admonitions to parties like Jefferson County to invoke joinder of parties and claims like this one in the first action if they wish to preclude subsequent parties with wholly separate claims from being heard.

B. The Irrational Exemption Scheme In Issue Here Is Unconstitutional

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall deny to any person within its jurisdiction the equal protection of the laws. *Nordlinger v. Hahn*, 505 U. S. 1 (1992). And while the Equal Protection Clause does not forbid reasonable classifications, it does keep governmental decisionmakers from treating differently persons who are in all relevant respects alike. *F. S. Guano Co. v. Virginia*, 253 U. S. 412, 415 (1920), *Plyler v. Doe*, 457 U. S. 202 (1982). And even where – as here – persons discriminated against do not fall in a suspect or quasi-suspect classification, the Equal Protection Clause forbids irrational means to serve legitimate ends. *Cleburne v. Cleburne Living Center, Inc.*, 473 U. S. 432, 442 (1985).

This Honorable Court summarized application of the Fourteenth Amendment to the case at bar in the *F. S. Guano* case, *supra*:

> But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."
>
> 253 U. S., at 412

This Court's rationality test specifically applies to tax exemption schemes. *Hooper v. Bernalillo County Assessor*, 472 U. S. 612 (1985).

By this petition, we invite this Honorable Court to revisit its decisions forbidding discriminations arbitrarily and irrationally imposed upon Vietnam war veterans who are newcomers to a state, rather than their more tenured brethren, *Hooper, supra*, upon recent real property purchasers rather than those who have managed to hold onto real property longer, *Allegheny Pittsburgh Coal Company, Inc. v. County Commission of Webster County, West Virginia*, 488 U. S. 336 (1989), upon disabled group home residents, rather than their better advantaged neighbors, *Cleburne, supra*, upon foreign corporations rather than their domestic counterparts, *Metropolitan Life Insurance Co. v. Ward*, 470 U. S. 869 (1984), *WHHY, Inc. v. Borough of Glassboro*, 393 U. S. 117 (1968), and upon recently arriving Alaskans seeking state oil reserve dividend distributions rather than their neighbors of longstanding vintage, *Zobel v. Williams*, 457 U. S. 55 (1982), and to then decide that the convoluted, cockamamie exemption scheme which is Jefferson County's cannot stand. It is an exemption scheme which completely *exempts* a bizarre collection of persons who happen to be employed by or as:

> utility companies; freight lines and equipment companies; electric companies; gas companies; railroads; telephone companies; telegraph com-

panies; express companies; financial institutions; insurance companies; abstract companies; acetylene gas and carbide manufacturers; adding machine, calculating machine and comptrometer businesses; advertising companies; air conditioning plant and equipment businesses; amusement parks; architects; attorneys; auctioneers; automobile dealers; automobile accessory dealers; automobile garages and shops; automobile storage garages; tire retreading shops; barbers; baseball parks; battery shops; beauty parlors; bicycle and motorcycle dealers; blueprint makers; bond makers; bottlers; bowling alleys; iron, railway supply, furnace supply and mining supply brokers and agents; broom, brush and mop manufacturers; cereal and soft drink retailers and wholesalers; certified public accountants; cigar, cigarette and cheroot retailers and wholesalers; circus operators; cleaning and pressing establishments; coal and coke dealers; coffin and casket manufacturers, dealers and agents; collection agencies; commission merchants or merchandise brokers; concert and musical entertainers; persons engaged in discounting notes, mortgages and conditional sales contracts; construction companies or contractors; cotton buyers; cotton compress operators; millers; persons operating cotton warehouses; credit agency personnel; persons operating creosoting businesses; delicatessen shops; dentists; detectives; film developers and printers; directory printers; refrigerator dealers; embalmers; engineers; owners and operators of fertilizer factories; damaged and close out goods salesmen; fireworks dealers; fortunetellers; palmists, clairvoyants, astrologers, phrenologists and crystal gazers; fruit dealers; gasoline station and pump operators; glass salesmen; golf course operators; hat cleaners; fur dealers; horse, ro-

deo, dog and pony show operators; horse and mule dealers; ice cream manufacturers; innkeepers; junk dealers; launderers; sleight-of-hand artists; lightning rod installers; lumber dealers and jobbers; lumberyard operators; machinery repair shops; manicurists; hairdressers; uphosterers; doctors, chemists, bacteriologists, and roentgenologists; persons engaged in the photocopy business; miners; monument and tombstone sellers; motion picture operators; oculists, optometrists and opticians; osteopaths and chiropractors; operators of packing houses and cold storage plants; pawnbrokers; peddlers and itinerant vendors; photographers; musical instrument salesmen; pig iron storage operators; pistor and knife dealers; playing card salesmen; plumbers, steamfitters and tin shop operators; pool halls, owners of racetracks and athletic fields; radio salesmen; real estate brokers and agents; restaurant, cafe and cafeteria operators; roadhouses, nightclubs and public dance halls; sandwich shops, barbecue stands, hamburger and hot dog stands; sawmills; scientists naturopaths and chiropodists; sewing machine salesmen; shooting gallery operators; shotgun and rifle dealers; skating rink operators; soliciting brokers; stock and bond brokers; street fair and carnival operators; syrum and sugar factory operators; theater, vaudeville and variety show operators; ticket scalpers; tourist camp operators; tractor, road machinery and trailer dealers; trading stamp merchants; freight carriers; transient dealers, vendors and peddlers; turpentine stillers; vending machine operators; veterinarians; warehouse operators; wax factory operators and waste grease and animal by-product purchasers and receivers (See Code of Alabama 1975, Legislative Manuscript Volume 6, Title 40, Chapter 12 and Ordinance 1120 at R. 33),

yet *taxes* average wage earners, laborers and all other persons who are not by other laws required to pay paltry license fees (five dollars for manicurists, twenty five dollars for neurosurgeons). We respectfully submit that it is impossible for Jefferson County or the State of Alabama to articulate a rational basis for exempting doctors and lightning rod installers, dentists and fortune tellers, attorneys and crystal ball gazers, and neurosurgeons and dog and pony show operators, to name but a few, from a substantial occupational tax while imposing the same tax on working stiffs like Richards and Hill. Moreover, Hill asserts that, as a domestic servant working in commercial buildings, she does the exact same sweeping and mopping that her colleagues who are domestic servants in private homes do (R. 386), yet she pays that tax while they enjoy complete exemption.

This exemption scheme could not be more irrational or arbitrary if it also exempted left handed men with freckles and green eyed women who refuse to eat broccoli. It goes far beyond the irrationality bounds this Honorable Court declared to be the line of demarcation between constitutional and unconstitutional classification in *Hooper, Allegheny Pittsburgh, Cleburne, Metropolitan Life,* and *WHHY, supra.*

CONCLUSION

Important federal constitutional claims arising from a patently irrational and arbitrary exemption scheme, never before reviewed or decided, will be effectively precluded forever unless this Honorable Court grants the writ, reverses the Supreme Court of Alabama, and allows Hill and Richards a day in court.

Wherefore, Petitioners request that their Petition be granted, that the decision of the Alabama Supreme

Court be reversed, and that the case be remanded for trial.

Respectfully submitted,

/s/ William J. Baxley

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APPENDIX

A-1

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1994-95

1930255

Jefferson County and the Birmingham-Jefferson Civic Center Authority

v.

Jason Richards, et al.

Appeal from Jefferson Circuit Court
(CV-92-3191)

ALMON, JUSTICE.

This appeal by permission is from the denial of a summary judgment in a declaratory judgment action brought on behalf of two classes of taxpayers against Jefferson County. The taxpayers sought to have Act 406, 1967 Ala. Acts, and Jefferson County Ordinance 1120, adopted in 1987, declared unconstitutional. Act 406 authorizes the Jefferson County Commission to levy a county occupational tax on all persons who earn wages in the County and who are not required to pay the state business license tax. Ordinance 1120 levies the county occupational tax at the rate of .005 (½ of 1%) on all eligible income earned in the county, exempting persons who pay the state business license tax and domestic servants employed in private homes. The complaint was filed by two classes of taxpayers: the "Foley-Dykes" class, which represents all Federal employees subject to the tax, and the "Richards-Hill" class, which represents all non-Federal employees subject to the tax. The complaint alleges that Act 406 and Ordinance 1120 violate the equal protection and due

process provisions of the Federal and State constitutions, and, with regard to the class of Federal employees only, the Buck Act, 4 U.S.C. § 111 et seq. The plaintiffs sought that the Act and the ordinance are made unconstitutional by what they call the arbitrary and irrational character of the exemptions. The Birmingham-Jefferson Civic Center Authority ("BJCC") was allowed to intervene, asserting as its interest $10 million per year of occupational tax proceeds that have been pledged to the BJCC for a 20-year period to repay BJCC special tax bonds that are not outstanding in the principal amount of over $123 million.

The County moved for a summary judgment, contending that all of the claims, except for the Federal employees' Buck Act claim, are barred by the doctrine of *res judicata*, based on the action that was the subject of this Court's opinion in *Bedingfield v. Jefferson County*, 527 So. 2d 1270 (Ala. 1988). The trial court entered a summary judgment for the County on all State constitutional claims, but denied the motion for summary judgment with regard to the Federal constitutional and statutory claims, stating:

> "In *Bedingfield v. Jefferson County*, 527 So. 2d 1270 (Ala. 1988), neither the trial court nor the Alabama Supreme Court determined whether Alabama Act No. 406 (Alabama Legislature 1967), authorizing the tax in question, or Jefferson County Ordinance No. 1120 (Jefferson County Commission 1987), imposing the tax in question, violates the equal protection clause of the United States Constitution by creating an unreasonable, unjust and improper classification of citizens subject to the tax, while exempting certain citizens from said tax in an arbitrary, irrational and unjust manner."

Pursuant to Rule 5, Ala. R. App. P., we granted the County permission to appeal the denial of the summary judgment. The issue before us is whether the trial court correctly held that the Federal constitutional claims are not barred by the doctrine of *res judicata* and thus correctly denied the summary judgment on these claims.

The doctrine of *res judicata* is a well-established principle of law:

> "The elements of res judicata, or claim preclusion, are (1) a prior judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) with substantial identity of the parties, and (4) with the same cause of action presented in both suits. *Hughes v. Allenstein*, 514 So. 2d 858, 860 (Ala. 1987)."

Dairyland Insurance co. v. Jackson, 566 So. 2d 723, 725 (Ala. 1990).

> "If those four elements are present, any claim that was or could have been adjudicated in the prior action is barred from further litigation."

Id.; Crutcher v. Wynn, 591 So. 2d 453, 454 (Ala. 1991); *Ex parte McCracken*, 576 So. 2d 664, 665 (Ala. 1991); *Wood v. Tricon Metals & Services, Inc.*, 548 So. 2d 138, 140 (Ala. 1989); *Trimble v. Bramco Products, Inc.*, 351 So. 2d 1357 (Ala. 1977).

> "In general a judgment is res judicata not only as to all matters litigated and decided by it, but as to all relevant issues which could have been but were not raised and litigated in the suit."

Heiser v. Woodruff, 327 U.S. 726, 735 (1946) (citations omitted).

The appeal in Bedingfield arose from two complaints that were consolidated in a single action. One complaint

was filed by Hoyt Bedingfield, Jr., individually as a taxpayer, and also in his capacity as acting director of finance of the City of Birmingham and by the City of Birmingham. The Bedingfield/Birmingham complaint requested a judgment declaring

> "that ordinance No. 1120 adopted by the Jefferson County Commission is void and invalid, and if necessary, that Act No. 406 passed by the Alabama Legislature in 1967 and approved by the Governor on September 7, 1967, is void and invalid to the extent that it supports any comprehensive occupational tax on all persons working in Jefferson County."

Among the grounds alleged in that complaint were that "Act 406 is a violation of the equal protection requirements and provisions of the federal and state constitution,' and that "Act 406 is vague and ambiguous and therefore is a violation of the due process requirements of the state and federal constitution."

The second complaint sought declaratory and injunctive relief "against the action of the Jefferson County Commission levying an occupational tax on employees of Jefferson County." It was filed by three persons "in their individual capacity" as "employees within Jefferson County." In addition to several other allegations of violations of due process and equal protection principles, the complaint alleged that the tax

> "constitutes a denial of equal protection in violation of the Fourteenth Amendment of the United States Constitution. *Said Act exempts professional occupations required by State law to be licensed but does not exempt other professional and nonprofessional occupations.*"

(Emphasis added.) This allegation is the substance of the allegations made in the complaint now before the Court.

The complaint that is the subject of this appeal asks the circuit court to "declare the occupational tax unconstitutional, as depriving plaintiffs of due process of law and equal protection of the laws" guaranteed under the United States and Alabama Constitutions. The same cause of action was presented in both actions. Both were actions for declaratory judgments challenging the constitutionality of the Jefferson County occupational tax. Both complaints alleged violations of the equal protection and due process provisions of the State and Federal constitutions. The appellate briefs in *Bedingfield* argued an equal protection issue regarding the fact that Act No. 406 applied only to counties with a population of 500,000 or more. *Bedingfield* was decided, both by the circuit court and by this Court, on other State constitutional grounds, but the Federal and State equal protection and due process claims were pleaded, and it is at least true that they "could have been adjudicated." *Dairyland Ins. Co. v. Jackson*, 566 So. 2d 723, 725 (Ala. 1990). Furthermore, they arguably were adjudicated, because they were grounds stated as a basis for relief, and a final judgment denying relief was affirmed.

"*Res judicata* applies not only to the precise legal theory presented in the prior case, but to all legal theories and claims arising out of the same nucleus of operative fact." *NAACP v. Hunt*, 891 F. 2d 1555, 1561 (11th Cir. 1990) (citations omitted).

> "'[A] party . . . is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds on which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible.' *Baltimore Steamship Company v. Vernon Philips*, 274 U.S. 316 [47 S.Ct. 600, 71 L.Ed.2d 1069] (1926)."

Century 21 Preferred Properties, Inc. v. Alabama Real Estate Comm'n, 401 So. 2d 764, 768 (Ala. 1981) (per Jones, J., with three Justices concurring and two Justices concurring in the result).

The only other element of *res judicata* that is at issue is "substantial identity of the parties," *see Dairyland, supra.*

> "The second set of persons whom *res judicata* applies is composed of those persons who are or were in privity with the parties to the original suit. . . . Privity is defined as 'a relationship between one who is a party of record and a nonparty that is sufficiently close so a judgment for or against the party should bind or protect the nonparty.' . . . Privity exists where the nonparty's interests were represented adequately by the party in the original suit. . . . Privity also exists where a party to the original suit is 'so closely aligned to a nonparty's interest as to be his virtual representative.' *United Merchants & Mfrs., Inc. v. Sanders*, 508 So. 2d 689, 692 (Ala. 1987)."

NAACP v. Hunt, supra, at 1560-61 (citations omitted). *See also Century 21, supra.* The taxpayers in the *Bedingfield* action adequately represented the interests of the taxpayers here, and the respective taxpayers' interests are not only closely aligned — they are essentially identical. The "substantial identity of the parties" element of *res judicata* is met here.

The wisdom of disallowing successive attacks on the county tax on grounds that could have been pursued and adjudicated in the initial challenge is demonstrated by the BJCC's motion to intervene, which recites that it issued two series of bonds in 1989 to expand and improve the civic center. The motion continues:

> "[P]ursuant to that certain Pledge and Appropriation Agreement between the Defendant Jefferson County and the intervenor, said Defendant appropriated, pledged and agreed to pay a portion of the proceeds of the Occupational Tax [at] issue in this matter to the BJCC for repayment of the Series 1989 and Series 1989B Capital Outlay Special Tax Bonds issued by the BJCC in twenty (20) annual payments of $10,000,000.00 beginning in the year 1989 and ending in the year 2008."

In 1989, the county and the Authority, in pledging the occupational tax revenue and issuing the bonds, could have relied on *Bedingfield* as authoritatively establishing that the county occupational tax was not unconstitutional for the reasons asserted by the *Bedingfield* plaintiffs. To allow a challenge now that was pleaded and could have been adjudicated in *Bedingfield* would not only violate the *res judicata* principles discussed above, but would also improperly interfere with the operations of the county and the BJCC and undermine the security of the bonds, to the detriment of the bondholders.

For the foregoing reasons, we conclude that the circuit court incorrectly held that Bedingfield v. Jefferson County, 527 So. 2d 1270 (Ala. 1988), did not, by the operation of the doctrine of res judicata, bar this action.

REVERSED AND REMANDED.

Shores, Kennedy, Cook, and Butts,* JJ., concur.

Maddox, J., dissents.

*Although Justice Butts was not a member of this Court when this case was orally argued, he has listened to the tape of oral argument and has studied the record.

MADDOX, JUSTICE (dissenting).

The elements of the doctrine of res judicata have been precisely set out by this Court in *Wheeler v. First Alabama Bank of Birmingham,* 364 So. 2d 1190, 1199 (Ala. 1978), where this Court said:

> "The elements of res judicata are as follows: (1) prior judgment rendered by court of competent jurisdiction; (2) prior judgment rendered on the merits; (3) parties to both suits substantially identical; and (4) same cause of action present in both suits."

See also *Dominey v. Mathison,* 292 Ala. 293, 293 So. 2d 471 (1974), and my dissenting opinion in *Century 21 Preferred Properties, Inc. v. Alabama Real Estate Comm'n,* 401 So. 2d 764, 770 (Ala. 1981). Even a cursory examination of this doctrine as applied to the facts of this case reveals that it has no application to this case. In this dissent, I will make a brief statement of the facts and will state the principle of law I think should be applied to sustain the trial court's order.

The majority holds that these plaintiffs are bound by the judgment rendered in *Bedingfield v. Jefferson County,* 527 So. 2d 1270 (Ala. 1988), where the City of Birmingham challenged the constitutionality of Act No. 406 and the validity of a county ordinance establishing an occupational tax.

The trial judge, in denying the defendant's motion for a summary judgment in this case (that motion being based on the ground that the action was barred by the doctrine of *res judicata),* issued an order in which he concluded, in part, that "[i]n *Bedingfield v. Jefferson County,* 527 So. 2d 1270 (Ala. 1988), neither the trial court nor [this Court] determined whether Act No. 406 (Alabama Legislature 1967), authorizing the tax in question, or Jefferson County Ordinance No. 1120 (Jefferson County Commission 1987), imposing the tax in question, violates the equal protection clause of the United States Constitution by creating an unreasonable, unjust and improper classification of citizens subject to the tax, while exempting certain citizens from said tax in an arbitrary, irrational and unjust manner." The trial judge also determined that "[i]n *Bedingfield v. Jefferson County,* 527 So. 2d 1270 (Ala. 1988), neither the trial court nor [this Court] determined whether the tax in question violates the Buck Act (4 U.S.C. § 111) as it pertains to federal employees." I agree with the trial court on both points.

In concluding that the trial judge was correct, I have examined the pleadings in *Bedingfield* and the order entered by the trial judge in that case and I have studied the opinion issued by this Court in *Bedingfield,* a case in which I participated. I have also carefully considered the argument of Jefferson County that "the claims in this case arise from the same nucleus of operative fact as the claims made in *Bedingfield* and [that] because the evidence necessary to support both claims is *identical,* it is axiomatic that the fourth element of *res judicata* is satisfied," and I have given careful consideration to the views of my colleagues expressed in the majority opinion, and my only comment is that if the "same cause of action presented in both suits" element of the res judicata doctrine is so easily satisfied, then it could be extended ad infinitum and would establish a precedent that could close the courthouse doors to other plaintiffs in other cases who might find themselves faced with the rule of law herein established. I think that the Court is establishing a bad precedent.

My opinion that Bedingfield does not bar the claims presented in this case is the same as that of the trial

judge: that this Court, in Bedingfield, did not adjudicate these claims, or any claim similar to them. The West Publishing Company synopsis in Bedingfield succinctly states what that case was about, and the issue it adjudicated:

> "City challenged constitutionality of county ordinance establishing occupational tax. The Circuit Court, Jefferson County, Braxton L. Kittrell, Jr., J., upheld ordinance, and appeal was taken. The Supreme Court, Beatty, J., held that: (1) statute authorized county to levy occupational tax; (2) statute was general rather than local legislation; and (3) statute authorizing levy of tax provided for collection of such tax."

527 So. 2d at 1270. Where in the Bedingfield opinion is there an adjudication of the federal constitutional claims the plaintiffs raise in the instant action? Neither the order of the trial judge nor the opinion of this Court contains a single reference to whether the Act and the county ordinance violate any provision of the Federal Constitution.

It is true that the plaintiffs, in *Bedingfield*, did allege in their complaint that "[i]f Ordinance No. 1120 were authorized by Act 406, then Act 406 is unconstitutional based upon any one of the following grounds: . . . . B. Act 406 is a violation of the equal protection requirements and provisions of the federal and state constitutions." But I ask this question: Is the mere making of such an allegation in a complaint sufficient to satisfy the "same cause of action presented in both suits" element of the res judicata doctrine? I think not, especially when the adjudicatory orders of the trial court, and of this Court, affirmatively show that the issues in *Bedingfield* involved whether Act No. 406 was a general law or was a local law because the Act was applicable oniy to counties with a population of 500,000 or more.

But even assuming that the federal equal protection claim was presented and adjudicated in *Bedingfield*, the plaintiffs in this case are attacking the *exemption scheme* contained in Ordinance No. 1120, which exempts a number of occupations from the occupational tax.[1] Clearly,

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[1] Ordinance 1120 taxes the gross receipts of any person who engages in or follows any "vocation, occupation, calling and profession," but exempts from its definition of "vocation, occupation, calling and profession" the following: utility companies; freight lines and equipment companies; electric companies; gas companies; railroads; telephone companies; telegraph companies; express companies; financial institutions; insurance companies; abstract companies; acetylene gas and carbide manufacturers; adding machine, calculating machine, and comptometer businesses; advertising companies; air condition plant and equipment businesses; amusement parks; architects; attorneys; auctioneers; automobile dealers; automobile accessory dealers; automobile garages and shops; automobile storage garages; tire retreading shops; barbers; baseball parks; battery shops; beauty parlors; bicycle and motorcycle dealers; blueprint makers; bond makers; bottlers; bowling alleys; iron, railway supply, furnace supply, and mining supply brokers and agents; broom, brush, and mop manufacturers; cereal and soft drink retailers and wholesalers; certified public accountants; cigar, cigarette, and cherott retailers and wholesalers; circus operators; cleaning and pressing establishments; coal and coke dealers; coffin and casket manufacturers, dealers, and agents; collection agencies; commission merchants or merchandise brokers; concert and musical entertainers; persons engaged in discounting notes, mortgages, and conditional sales contracts; construction companies or contractors; cotton buyers; cotton compress operators; millers; persons operating cotton warehouses; credit agency personnel; persons operating creosoting businesses; delicatessen shops; dentists; detectives; film developers and printers; directory printers; refrigerator dealers; embalmers; engineers; domestic servants employed in private homes; owners and operators of fertilizer factories; damaged and close out goods salesmen; fireworks dealers; fortunetellers, palmists, clairvoyants, astrologers, phrenologists and crystal gazers; fruit dealers; gasoline station and pump operators; glass salesmen; golf course operators; hat cleaners; fur dealers; horse, rodeo, and dog and pony show operators; horse and mule dealers; ice cream manufacturers; innkeepers; junk dealers; launder-

that claim was not presented or adjudicated in *Bedingfield*.

Jefferson County and BJCC argue that even if the plaintiffs' claims were not previously raised or adjudicated in the *Bedingfield* case, the claims are barred, nevertheless, because "any claim that was or could have been adjudicated in the prior action is barred from further litigation." *Dairyland Insurance Co. v. Jackson*, 566 So. 2d 723, 725 (Ala. 1990). Stated differently, the County and BJCC contend that the theory on which the plaintiffs bring this action could have been asserted in the

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ers; sleight-of-hand artists; lighting rod installers; lumber dealers and jobbers; lumberyard operators; machinery repair shops, manicurists; hairdressers; upholsterers; doctors, chemists, bacteriologists, and roentgenologists; persons engaged in the photocopy business; miners; monument and tombstone sellers; motion picture operators; oculists, optometrists, and opticians; osteopaths and chiropractors; operators of packing houses and cold storage plants; pawnbrokers; peddlers and itinerant vendors; photographers; musical instrument salesmen; pig iron storage operators; pistol and knife dealers; playing card salesmen; plumbers, steamfitters and tin shop operators; operators of pool halls, owners of racetracks and athletic fields; radio salesmen; real estate brokers and agents; restaurant, cafe, and cafeteria operators; operators of roadhouses, nightclubs, and public dance halls; sandwich shops, barbecue stands, hamburger and hot dog stands; sawmills; scientists, naturopaths and chiropodists; sewing machine salesmen; shooting gallery operators; shotgun and rifle dealers; skating rink operators; soliciting brokers; stock and bond brokers; street fair and carnival operators; syrup and sugar factory operators; theater, vaudeville, and variety show operators; ticket scalpers; tourist camp operators; tractor, road machinery, and trailer dealers; trading stamp merchants; freight carriers; transient dealers, vendors, and peddlers; turpentine stillers; vending machine operators; veterinarians; warehouse operators; wax factory operators and waste grease and animal by-product purchasers and receivers. See Ordinance 1120, § 1(B) and § 2; §§ 40-12-40 through 40-12-180, § 40-12-50, § 40-12-52 through 40-12-55, §§ 40-12-57 through 40-12-60, § 40-16-6, and § 27-4-9, Ala. Code 1975.

Bedingfield case and that this action is therefore due to be dismissed.

The test for determining whether two cases involve substantially the same cause of action is whether the same evidence would support a recovery in both actions. *Barber v. Fields*, 624 So. 2d 532, 536 (Ala. 1993); *Vaughan v. Barr*, 600 So. 2d 994, 996 (Ala. 1992); *Waters v. Jolly*, 582 So. 2d 1048, 1053 (Ala. 1991); *Garris v. South Alabama Production Credit Ass'n*, 537 So. 2d 911, 914 (Ala. 1989); *Dominex, Inc. v. Key*, 456 So. 2d 1047, 1054-55 (Ala. 1984); *Wheeler v. First Alabama Bank of Birmingham*, 364 So. 2d 1190, 1200 (Ala. 1978). In *Barber v. Fields*, this Court reversed a summary judgment entered on *res judicata* grounds where both the former and the latter cases involved the city water service but the claims in the latter case, which pertained to the removal of water meters, was not litigated in the former case, which involved a claim that the city's refusal to extend water service to the plaintiff's land was a violation of her right to equal protection of the laws. *Barber*, 624 So. 2d at 536. In *Vaughan v. Barr*, this Court reversed a judgment entered on *res judicata* grounds where both the former case and the latter case involved the same land and landowners but the former case, which involved a boundary dispute, was "based on different theories" and "require[d] different evidence" from that required in the latter case, which involved a claim of an easement by necessity. *Vaughan*, 600 So. 2d at 996.

Although this case and the *Bedingfield* case involve Act 406 and Ordinance 1120, the similarity there ends, because the evidence necessary to prove the claims asserted in this case, and the legal arguments in support of those claims, will be very different from those in *Bedingfield*. Here, the plaintiffs allege that the exemptions to the tax violate their equal protection rights under the Federal Constitution. The Federal employees are permitted to

maintain their Buck Act claims. How are their claims different from those of the non-Federal employees who claim equal protection violations? In each case, the plaintiffs apparently are citizens of the United States who are claiming protection of their rights under Federal constitutional and statutory provisions. The foundation of their claims, the Federal Constitution, is the same.

I have carefully examined the arguments of Jefferson County and those of BJCC, and I recognize the importance of this case to those entities, but I think the law is against them. The plaintiffs' claims in this case are just different from those presented in *Bedingfield*, and the evidence necessary to prove their claims will be very different from the evidence used to prove the claims asserted in *Bedingfield*. In fact, the issues presented in *Bedingfield* were largely legal issues relating to the classification between counties of 500,000 or more in population and counties of less than 500,000 in population and to the question of whether Act 406 violated the Alabama Constitution, and there is no mention in *Bedingfield* of any Federal constitutional claims adjudicated in either the trial court or this Court.

Based on the foregoing, I believe that the fourth element of the doctrine of *res judicata* as set forth in *Dairyland Insurance Co. v. Jackson*, 566 So. 2d 723, 725 (Ala. 1990) ("the same cause of action presented in both suits"), is not present in this case; I believe that the trial judge correct concluded that the plaintiffs could maintain their action.

SUPREME COURT OF ALABAMA

IMPORTANT INFORMATION REGARDING SECOND COPY OF RECORD ON APPEAL AND EXHIBITS

RETURN OF SECOND COPY OF RECORD ON APPEAL:

In the event a second copy of the record has been filed pursuant to Rule 30(g), Alabama Rules of Appellate Procedure, any party or attorney desiring to receive the second copy of the record should make a written request to the Clerk of the Supreme Court within 30 days from date of decision. Otherwise, the second copy of the record will be destroyed.

RETURN OF EXHIBITS:

Any party or attorney may make a written request to the Clerk of the Supreme Court for return of exhibits prior to the expiration of the periods set out in the records retention schedule of the Supreme Court of Alabama as indicated below.

DESTRUCTION OF EXHIBITS:

Pursuant to the Records Retention Schedule of this Court, all original exhibits contained in separate volumes of the record on appeal, or sent to the Court under separate cover (including charts, maps, depositions, and physical exhibits) will be destroyed as follows:

At the end of one year after decision	—	Destroy all exhibits in affirmed cases.
At the end of two years after decision	—	Destroy all exhibits in reversed cases.

IN THE SUPREME COURT OF ALABAMA
June 9, 1995

1930255

Jefferson County and the Birmingham-Jefferson Civic Center Authority v. Jason Richards, et al. (Jefferson: CV-92-3191)

NOTICE

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

ALMON, J. — Shores, Kennedy, Cook and Butts, JJ., concur;

Maddox, J., dissents

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this 9 day of Jun, 1995.

/s/ Robert G. Esdale

Robert G. Esdale
Clerk, Supreme Court
of Alabama

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

JASON RICHARDS and FANNIE HILL, individually and on behalf of all employees of the United States of America, who are subject to the Jefferson County, Alabama occupational tax which is more particularly described by this complaint; and GEORGE DAVID DYKES and JOAN FOLEY DYKES, individually and on behalf of all employees of the United States who are subject to the Jefferson County, Alabama occupational tax which is more particularly described by this complaint;	*	CIVIL ACTION NO. CV-92-03191
PLAINTIFFS,	*	
VS.	*	
JEFFERSON COUNTY, a political subdivision of the State of Alabama, and RANDY GODEKE, individually and in his official capacity as Director of the Department of Revenue for Jefferson County, Alabama, and as successor in office to C. H. Ritchie, former Director of the Department of Revenue for Jefferson County, Alabama	*	
DEFENDANTS.	*	

ORDER

After a consideration of the law, statutes, legal evidence and argument of counsel for the parties the Court finds that Defendant is entitled to summary judgment as to certain claims raised by the Plaintiffs due to the doctrine of res judicata, but that certain of Plaintiffs' claims should not be dismissed. The Court FINDS as follows:

1. In *Beddingfield v. Jefferson County*, 527 So. 2d 1270 (Ala. 1988), neither the trial court nor the Alabama Supreme Court determined whether Alabama Act No. 406 (Alabama Legislature 1967), authorizing the tax in question, or Jefferson County Ordinance No. 1120 (Jefferson County Commission 1987), imposing the tax in question, violates the equal protection clause of the United States Constitution by creating an unreasonable, unjust and improper classification of citizens subject to the tax, while exempting certain citizens from said tax in an arbitrary, irrational and unjust manner.

2. In *Beddingfield v. Jefferson County*, 527 So. 2d 1270 (Ala. 1988), neither the trial court nor the Alabama Supreme Court determined whether the tax in question violates the Buck Act (4 U.S.C. §111) as it pertains to federal employees.

3. The trial court in *Beddingfield v. Jefferson County*, 527 So. 2d 1270 (Ala. 1988), did in fact consider the constitutionality of Alabama Act No. 406 and Jefferson County Ordinance No. 1120 as it relates to the *Constitution of Alabama* of 1901 and found "nothing" in said Act to be "repugnant" to such a degree as to invalidate the Act, and further did not find Ordinance No. 1120 to be "invalid". *(Order* of Judge Braxton Kittrell, Specially Sitting, CV-87-504-465 and CV-87-504-469, Jefferson County, Alabama, December 11, 1987).

Thus the state constitutional issues in this matter have been previously adjudicated.

Accordingly, Summary Judgment is GRANTED in favor of Defendant, and against Plaintiffs as to Counts Three and Four of the Complaint based on the doctrine of res judicata. Summary Judgment is DENIED as to Counts One and Two.

Done and Ordered this 8th day of April, 1993.

/s/ John E. Rochester

JOHN E. ROCHESTER
CIRCUIT JUDGE
SPECIALLY SITTING

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

JASON RICHARDS and FANNIE HILL, individually and on behalf of all employees, excluding employees of the United States of America, who are subject to the Jefferson County, Alabama occupational tax which is more particularly described by this complaint; and GEORGE DAVID DYKES and JOAN FOLEY DYKES, individually and on behalf of all employees of the United States who are subject to the Jefferson County, Alabama occupational tax which is more particularly described by this complaint;	*	CIVIL ACTION NO. CV9203191
Plaintiffs,	*	
vs.	*	
JEFFERSON COUNTY, a political subdivision of the State of Alabama, and RANDY GODEKE, individually and in his official capacity as Director of the Department of Revenue for Jefferson County, Alabama, and as successor in office to C. H. Ritchie, former Director of the Department of Revenue for Jefferson County, Alabama	*	
Defendants.	*	

COMPLAINT

Plaintiffs, by and through their undersigned counsel, complain and allege as follows:

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to Rule 57, Alabama Rules of Civil Procedure and 42 U.S.C. 1983, as this is a civil action arising under the laws and Constitution of the United States. This action involves a violation of federal law for which 42 U.S.C. 1983 provides a remedy, and to which Rule 37 of the Alabama Rules of Civil Procedure is applicable. A question of intergovernmental immunity arising under the Buck Act, 4 U.S.C. 101, et seq, is presented by Plaintiffs Dykes individually, and on behalf of all similarly situated federal employees. Venue lies in the Circuit Court of Jefferson County, Alabama, the tax challenged by this action being levied and collected by Jefferson County, Alabama, against and from plaintiffs, and similarly situated class members within Jefferson County, Alabama.

PARTIES

2. Plaintiff Jason Richards is a courier privately employed by a law firm in Jefferson County, Alabama, and is a resident citizen of Jefferson County, Alabama; Fannie Hill is a domestic servant privately employed in commercial building sin Jefferson County, Alabama, and is a resident citizen of Jefferson County, Alabama; they bring this action individually on their behalf, and in a representative capacity on behalf of all other employees in Jefferson County, Alabama, other than employees of the United States of America, who have been subject to the levy, collection and payment of taxes established by Jefferson County Ordinance 1120, commonly known as the Jefferson County Occupational Privilege Tax ("the occupa-

tional tax") since January 1, 1988. George David Dykes is a Reclamation Specialist employed by the United States of America in the Office of Surface Mining, Department of the Interior in Jefferson County, Alabama, and is a resident citizen of Jefferson County, Alabama; Joan Foley Dykes is a Registered Nurse employed by the United States of America in the Department of Veterans' Affairs in Jefferson County, Alabama, and is a resident citizen of Jefferson County, Alabama; they bring this action individually on their own behalf, and in a representative capacity on behalf of all other employees of the United States of America, who have been subject to the levy, collection and payment of the occupational tax since January 1, 1988. Plaintiffs Jason Richards, Fannie Hill, and Joan Foley Dykes have been required by their employers to pay the occupational tax at all times relevant to these proceedings, continuously since January 1, 1988, when the occupational tax became effective. Plaintiff George David Dykes was required by his employer to pay the occupational tax for approximately one year after enactment of the occupational tax, after which he refused to continue to do so, based upon the authorities cited herein.

CLASS ACTION AVERMENTS

3. This lawsuit is brought by plaintiffs as a class action, on their own behalf and on behalf of all others similarly situated, under the provisions of Rule 23(a) and Rule 23(b)(1) of the Alabama Rules of Civil Procedure for injunctive and declaratory relief, and for an order awarding members of the plaintiff classes compensatory damages in sums equal to the amounts of taxes illegally levied, collected and paid by them, and for relief incident and subordinate thereto, including costs and attorneys fees pursuant to 42 U.S.C. 1988, and such other authorities as shall be determined applicable to this action.

4. The classes represented by plaintiffs in this action, and of which plaintiffs themselves are members, consist of all persons subject to the occupational tax, both federal and non-federal employees, who have been subject to its levy, collection and payment since January 1, 1988, when the occupational tax became effective.

5. The exact number of members of the classes, as herein identified, is not known, but it is estimated that there are thousands of members of each class. The classes are so numerous that joinder of individual members herein is impracticable.

6. There are common questions of law and fact in the action that relate to and affect the rights of each member of the classes represented by the named plaintiffs and the relief sought is common to both classes, namely a declaration that the occupational tax is unconstitutional.

7. The claims of plaintiffs, who are representatives of the class herein are typical of the claims of the classes they represent, in that the claims of all members of the classes, including plaintiffs, depend on a showing of the unconstitutionality of the occupational tax in a manner which is beneficial to each. There is no conflict as between any individual named plaintiff and any other member of either class with respect to this action, or with respect to the relief sought herein. The Dykes Class of federal employees are beneficiaries of federal and state statutes which prohibit discrimination in a manner which is consistent with the general prohibition of discrimination applicable to the Richards/Hill Class of non-federal employees, and both classes are protected equally by the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States, and the state laws cited herein.

8. The named plaintiffs are the representative parties for their respective classes, and are able to, and will, fairly and adequately protect the interests of the classes they

represent. The attorneys for plaintiffs are experienced and capable in litigation in the field of constitutional, tax and civil rights claims, and have successfully represented claimants in other litigation of this nature.

ALLEGATIONS OF FACT

9. On or about January 1, 1988, Defendant Jefferson County levied and began collecting, and Plaintiffs and the classes they represent began involuntarily paying, the occupational tax, which was described by Defendant as a "license or privilege tax on natural persons engaged in any vocation, occupation, calling or profession who are not required by law to pay any license or privilege tax to the state or county." A copy of the occupational tax ordinance is attached to this complaint, and made a part hereof as Exhibit A.

10. The occupational tax is calculated as one-half of one percent of the gross earnings of plaintiffs and members of both classes, but is characterized by Defendant as a license or privilege tax, rather than an income tax. Specifically the taxing ordinance provides:

> It shall be unlawful for any person to engage in or follow any vocation occupation, calling or profession as defined in Section 1 within the County on and after the 1st day of January, 1988, without paying license fees to the County for the privilege of engaging in or following such vocation, occupation, calling or profession, which license fees shall be measured by one-half percent (1/2%) of the gross receipts of each such person.

11. The taxing ordinance also defines gross receipts and compensation, as follows:

> The words "gross receipts" and "compensation" shall have the same meaning, and both words

> shall mean and include the total gross amount of all salaries, wages, commissions, bonuses or other money payment of any kind, or any other considerations having monetary value, which a person receives from or is entitled to receive from or be given credit for by his employer for any work done or personal services rendered in any vocation, occupation, calling or profession, including any kind of deductions before "take home" pay is received; but the words "gross receipts" and compensation shall not mean or include amounts paid to traveling salesmen or other workers as allowance or reimbursement for traveling or other expenses incurred in the business of the employer, except to the extent of the excess of such amounts over such expenses actually incurred and accounted for the by employee to the employer.

12. The occupational tax carves out of its scope, by way of its definition of "vocation, occupation, calling and profession" a substantial array of persons, as follows:

> The words "vocation, occupation, calling and profession" shall mean the doing of any kind of work, the rendering of any kind of personal services, or the holding of any kind of position or job within Jefferson County, Alabama, by any clerk, laborer, tradesman, manager, official or other employee, including any non-resident of Jefferson County who is employed by any employer as defined in this section, where the relationship between the individual performing the services and the person for whom such services are rendered is, as to those, services, the legal relationship of employer and employee, including also a partner of a firm or an officer of a firm or corporation, if such partner or officer receives a salary for his personal services rendered in the business of such firm or corpora-

> tion, but they shall not mean or include domestic servants employed in private homes and shall not include businesses, professions or occupations for which license fees are required to be paid under any General License Code of the County or to the State of Alabama or the County by any of the following: Chapter 12, Article 2, Title 40; Sections 40-21-50, 40-21-52, 53, 54 and 55; 40-21-57, 58, 59 and 60; 40-16-6; and 27-4-9 of the Code of Ala. 1975, as amended.

and also includes within its ambit all federal employees represented here by Plaintiffs Dykes, as follows:

> The words "vocation, occupation, calling and profession" shall also mean and include the holding of any kind of office or position either by election or appointment, by any federal, state, county or city officer or employee where the services of such official or employee are rendered within Jefferson County, Alabama.

13. The occupational tax broadly defines "employer" to "mean and include any person, business, firm, corporation, partnership, association or any other kind of organization who or that employs any person in any vocation, occupation, calling or profession in Jefferson County, Alabama, within the meaning of subsection (B) of Section 1 of this Ordinance." (This subsection is set forth in full at paragraph 12 of this complaint). Defendant, by and through its Director of Revenue and County Attorney, has interpreted "employer" to include the United States of America, and "employee" to include all federal employees in Jefferson County, including all United States District Judges in the Northern District.

14. The occupational tax by its terms, and in actual practice, exempts from its levy, collection and payment businesses and vocations or occupations listed at Chapter 12, Article 2, Title 40, Code of Ala. 1975, as amended,

which range from attorneys, certified public accountants, dentists and physicians to blueprint makers, casket manufacturers, pig iron storage operators, lightning rod installers and snuff retailers, and it includes a specific exemption for domestic servants employed in private homes. By its terms and in actual practice, it taxes all federal employees, including all United States District Judges in the Northern District of Alabama, all Circuit, District and Probate Judges in Jefferson County, and an array of other occupations, including couriers, secretaries, skilled and unskilled laborers, police officers, business executives, teachers and domestic servants not employed in private homes.

15. The net effect, dollarwise, of the occupational tax, is an absurdity which allows, by way of example, physicians and attorneys earning hundreds of thousands of dollars a year to pay a license fee of $150.00 or less and avoid the occupational tax — which would be levied at more than ten times the amount of the license fee paid by these high income professionals. In all cases, the occupational tax imposes upon those citizens against whom it is levied and collected a percentage of income tax which is substantially more than the license fees paid by similarly situated persons exempted from its burden.

16. The occupational tax, on its face and in actual practice, is arbitrary and capricious, and discriminatory in a manner which defies logic and, insofar as federal employees are concerned, 4 U.S.C. 111. The array of persons subject to the occupational tax, when compared with the array of persons exempted from the tax, and the concomitant disparity in taxes paid by and between occupations in Jefferson County, Alabama which falls within and without the burden of the occupational tax, render it irrational, unduly burdensome, and violative of the equal protection clause and the due process clause of

Fourteenth Amendment to the Constitution of the United States.

17. The content, nature and characteristics of the employment of Plaintiffs Dykes, Richards and Hill, and all the members of the classes they represent, are neither reasonably, rationally or fairly different, nor professionally distinct, from the content, nature and characteristics of the employment of the above described persons exempt from the occupational tax, and the economic burden thrust upon them by Defendant, relative to those exempted, is substantial and absurd.

18. The irrationality and unconstitutionality of the occupational tax is well known to the Defendant's officers and agents responsible for its administration and collection, and has resulted in their adoption of a policy of further exemption from its levy and collection federal employees who refuse to pay it. This pay-if-you-wish policy is itself arbitrary and capricious, irrational, indicative of Defendant's callous disregard of the constitutional rights of other federal and private employees from whom the tax is collected, and demonstrative of Defendant's cognizance of the constitutional defects complained of herein.

19. Plaintiffs aver that unless Defendant is enjoined and restrained by the court from enforcing the occupational tax ordinance, they will suffer economic injury.

COUNT ONE
DYKES CLASS BUCK ACT CLAIMS
AND FEDERAL CONSTITUTIONAL CLAIMS

20. Plaintiffs Dykes, individually and on behalf of the above described class of employees of the United States which they represent, claim Defendants, a political subdivision of the State of Alabama and its Director of Revenue, acting by and through their County Attorney, and

such other administrative officers as have acted and continue to act in concert with them, were and are acting under color of a statute, ordinance, regulation, custom or usage of the State of Alabama in subjecting its citizens described herein to a deprivation of rights, privileges or immunities secured by the Constitution and laws of the United States, specifically 4 U.S.C. 111 and the due process and equal protection clauses of the Constitution of the United States.

21. The occupational tax violates the equal protection guaranties of the Fourteenth Amendment to the United States Constitution and 4 U.S.C. 111 by unreasonably and arbitrarily favoring the above described state, local and private employees who are exempted from its purview in the unequal manner described above while taxing the similarly situated federal employees represented by Plaintiffs Dykes as described herein.

22. The occupational tax has been previously challenged in this court on non-federal and other state law grounds, and, its measurement by a percentage of pay or compensation for personal service as described by 4 U.S.C. 111 notwithstanding, been declared to be a license or privilege tax rather than an income tax. *Bedingfield* v. *Jefferson County*, 527 So.2d 1270 (Ala. 1988). In the trial court in *Bedingfield, supra*, the plaintiff initially asserted that the occupational tax was, under state law, an illegal income tax; the trial court rejected that claim, and it was abandoned on appeal.

23. Plaintiffs Dykes and their similarly situated federal employee class members also claim the occupational tax is so arbitrary and irrational, as described herein, as to violate the due process clause of the Fourteenth Amendment to the Constitution of the United States, both on its face and in its application to both classes of taxpayers bringing this action.

COUNT TWO

RICHARDS/HILL CLASS FEDERAL CLAIMS

24. Plaintiffs Richards and Hill, individually and on behalf of the class of non-federal employees they represent, claim Defendants, a political subdivision of the State of Alabama, and its Revenue Commissioner, acting in concert with their County Attorney, and such other administrative officers as have acted and continue to act in concert with them, were and are acting under color of a statute, ordinance, regulation, custom or usage of the State of Alabama in subjecting or causing its citizens described herein to a deprivation of rights, privileges or immunities secured by the Constitution and laws of the United States, specifically the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

25. The occupational tax violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by discriminating against Plaintiffs Richards and Hill, and the class of similarly situated non-federal employees they represent, a class against whom it has been and is now levied and collected, in a manner which is not only arbitrary and irrational, as described herein, but which also creates an unjust, unreasonable and improper classification of citizens subject to the tax. There is no legitimate difference between Plaintiffs Richards and Hill, and the class of non-federal employees they represent and the above described exempted employees which is related to any legitimate government object or purpose, and the arbitrariness and capriciousness of selection of the Richards/Hill class by Defendant to pay the occupational tax is clear upon the face of the taxing ordinance and in its implementation by Defendant. Persons engaged in the same businesses as Richards and Hill, and the members of the class they represent are granted exemption privileges by Defendant under em-

ployment conditions which are the same as those experienced by Richards, Hill and the Richards/Hill class, while the Richards/Hill class is contemporaneously, arbitrarily and unreasonably — in the context of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States — taxed.

26. The occupational tax has been previously challenged in the state courts on other state law grounds, and, measurement by a percentage of pay or compensation for personal service notwithstanding, been declared to be a license or privilege tax rather than an income tax. *Bedingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988). In the trial court in *Bedingfield, supra*, the plaintiff initially asserted that the occupational tax was, under state law, an illegal income tax; the trial court rejected that claim, and it was abandoned on appeal. Additionally, these federal constitutional claims are joined in this action with federal Buck Act claims which present a related federal statutory question under federal law.

27. Plaintiffs Richards and Hill and their similarly situated non-federal employee class members also claim the occupational tax is so arbitrary and irrational, as described herein, as to violate the due process clause of the Fourteenth Amendment to the Constitution of the United States, both on its face and in its application to both classes of taxpayers bringing this action.

COUNT THREE

DYKES CLASS PENDENT STATE LAW CLAIMS

28. Plaintiff Dykes, individually and on behalf of the above described class of employees of the United States which they represent, claim the occupational tax violates Code of Ala. 1975, Section 40-18-3, which provides that the salaries, fees, commissions or other income of officers or agents of the United States or its agencies and

instrumentalities or its contractees, received from the United States or from its agencies and instrumentalities, shall be subject to income taxes levied by the state of Alabama as other income is taxed, but without discrimination, and only to the same extent and in the same manner as other income is taxed, insofar as the State of Alabama may be constitutionally or legally authorized to tax such income.

29. The Alabama Constitution prohibits cities and counties from collecting income taxes, hence Defendant's designation of the occupational tax as a license or privilege tax, despite its measurement by a percentage of gross income or gross receipts.

30. The occupational tax, as a license tax measured by a percentage of gross income or gross receipts, authorized by a general law of the State of Alabama, is nevertheless subject to the "without discrimination" prohibition of Code of Ala. 1975, Section 40-18-3, and that code section's requirement that it be collected "only to the same extent and in the same manner as other income is taxed." Plaintiffs Dykes and the class of federal employees they represent, based upon the above described allegations regarding persons exempted from paying the occupational tax, aver that they have been discriminated against and required to pay taxes to a different extent and in a different manner from their incomes in violation of Code of Ala. 40-18-3 and the due process and equal protection provisions of the Constitution of Alabama of 1901.

COUNT FOUR
RICHARDS/HILL CLASS PENDENT STATE CLAIMS

31. Plaintiffs Richards and Hill, individually and on behalf of the class of non-federal employees subject to the occupational tax which they represent, aver that the

occupational tax discriminates against non-federal employees, as described above, in a manner which violates the due process and equal protection provisions of the Constitution of Alabama of 1901.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that the Court grant and award them the following relief:

A. That a hearing be set as soon as practicable after commencement of this action, under Rule 23(c)(1), Federal Rules of Civil Procedure, to determine by order whether this action is to be maintained as a class action, and whether certification should be conditional, and whether the Richards' and Dykes' classes should be certified as sub-classes pursuant to Rule 23(c)(4)(B), Alabama Rules of Civil Procedure.

B. That the Court declare the occupational tax unconstitutional, as depriving plaintiffs of due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, violative of intergovernmental immunity secured by 4 U.S.C. 111, violative of the due process and equal protection clauses of the Constitution of Alabama of 1901, and violative of Code of Ala. 1975, Section 40-18-3.

C. That the Court declare the occupational tax unconstitutional in its application to plaintiffs, depriving them of due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, violative of intergovernmental immunity secured by 4 U.S.C. 111, violative of the due process and equal protection clauses of the Constitution of Alabama of 1901, and violative of Code of Ala. 1975, Section 40-18-3 by virtue of Defendants' policy of allowing taxpayers who disagree with the tax to disregard it while insisting upon its payment by those who cannot persuade their

employers to cease payroll deductions or who otherwise lack the necessary clout with Defendants to prevent its levy and collection.

D. That the Court award plaintiffs, as compensatory damages suffered as a result of Defendant's deprivations of the constitutional rights described herein, a sum equal to the amount of tax each has paid to the Defendant since January 1, 1988.

E. That the Court enjoin and restrain Defendant from continued deprivations of the constitutional rights described herein by way of the occupational tax.

F. That the Court allow plaintiffs and their counsel all costs in this proceeding and payment of a reasonable attorneys fee, determined by 42 U.S.C. 1988 and/or pursuant to equitable common fund principles to attorneys for plaintiffs and the classes represented by them.

G. That the Court award plaintiffs such other and further relief as the Court, after a full hearing, deems appropriate.

BAXLEY, DILLARD & DAUPHIN

/s/ William J. Baxley

WILLIAM J. BAXLEY

/s/ Joel E. Dillard

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Randy Godeke, Director
Jefferson County Department of Revenue
100-A Courthouse
Birmingham, AL 35263

IN THE CIRCUIT COURT FOR JEFFERSON COUNTY
TENTH JUDICIAL CIRCUIT, ALABAMA

JASON RICHARDS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CASE NO. CV 92-3191
	)	
JEFFERSON COUNTY, et al.,	)	
	)	
Defendants.	)	

ANSWER

Come now the Defendants, Jefferson County, Alabama, a political subdivision of the State of Alabama, and Randy Godeke, individually, and in his official capacity as Director of the Jefferson County, Alabama, Department of Revenue, and for answer to the Complaint state as follows:

FIRST DEFENSE

Admission and Denial

1. For answer to paragraph 1 of the Complaint, Defendants admit that Plaintiffs attempt to invoke the jurisdiction of this Court pursuant to 42 U.S.C. § 1983, 4 U.S.C. § 101 and Rule 57, Alabama Rules of Civil Procedure. Defendants admit that Jefferson County, Alabama, is the proper venue for this case.

2. For answer to paragraph 2 of the Complaint, Defendants demand strict proof in that Defendants are without knowledge or information sufficient to from a belief as to the truth of the allegations regarding residence and employment of Jason Richards, Fannie Hill, George David

Dykes and Joan Foley Dykes. Defendants state that they are without sufficient information to form a belief as to the truth of the remaining allegations of paragraph 2 of the Complaint and demand strict proof.

3. For answer to paragraph 3 of the Complaint, Defendants admit that Plaintiffs attempt to invoke the provisions of Rule 23, Alabama Rules of Civil Procedure.

4. For answer to paragraph 4 of the Complaint, Defendants admit that Plaintiffs are subject to the Jefferson County occupational tax.

5. For answer to paragraph 5 of the Complaint, Defendants admit that there are numerous taxpayers.

6. For answer to paragraph 6 of the Complaint, Defendants deny that the Jefferson County occupational tax is unconstitutional.

7. For answer to paragraph 7 of the Complaint, Defendants deny that the occupational tax is unconstitutional. Defendants state that they are without information and belief as to any conflicts which may or may not exist between Plaintiffs and demand strict proof.

8. For answer to paragraph 8 of the Complaint, Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and demand strict proof.

9. For answer to paragraph 9 of the Complaint, Defendants admit that on or about January 1, 1988, Jefferson County, Alabama, began to levy and collect the occupational tax. Defendants deny that Plaintiffs paid said tax involuntarily. For answer to the remaining portion of paragraph 9 of the Complaint, Defendants plead the language of the occupational tax ordinance which is attached hereto as Exhibit "A" and Act No. 406, Legislature 1967, attached as Exhibit "B."

10. For answer to paragraph 10 of the Complaint, Defendants plead the plain language of the Jefferson

County occupational tax which is attached hereto as Exhibit "A" and which speaks for itself.

11. For answer to paragraph 11 of the Complaint, Defendants plead the plain language of the Jefferson County occupational tax which is attached hereto as Exhibit :A" and which speaks for itself.

12. For answer to paragraph 12 of the Complaint, Defendants plead the plain language of the Jefferson County occupational tax which is attached hereto as Exhibit "A" and which speaks for itself.

13. Admitted.

14. For answer to paragraph 14 and 15, Defendant states as follows:

The Jefferson County Occupational Tax Ordinance No. 1120 comports with the express authority granted to the Jefferson County Commission by Act No. 406, Legislature of Alabama, 1967 ("Act No. 406"). Act No. 406 reflects an acknowledgment of the Alabama Legislature that numerous person, corporations, firms, associations or entities were already required by State law to pay a license or privilege tax to either the State of Alabama or to the County pursuant to Article 1, Chapter 20, Title 51; Sections 176, 177, 178, 180, 182, 183, 184, 186, 429 and 826 in Title 51 of the Code of Alabama of 1940, as amended. Act No. 406 authorized the County Commission to levy a license or privilege tax upon any person, corporation, firm, association or other entity and business, vocation, occupation, calling or profession that is not required by law to pay any license or privilege tax to either the State of Alabama or the County by any of the foregoing provisions of the Code of Alabama.

The legislature in Section 6, Act No. 406, further limited the authority granted to the County Commission by declaring that:

> Section 6. No license or privilege tax levied by the governing body of the county on any person for engaging in any business shall be at a rate which is in excess of the rate of license or privilege tax levied by the largest municipality of the county on the same or similar type business activity.

Accordingly, the Jefferson County Occupational Tax ordinance incorporates the same exclusions from its provisions as are required by Act No. 406. Further, the Jefferson County Occupational Tax Ordinance specifically excludes "domestic servants employed in private homes" for the reason that such persons are excluded from the occupational tax of the City of Birmingham which is the largest municipality located in Jefferson County, as required by Section 6, Act No. 406, above.

15. Defendants deny paragraphs 16 and 17. For further answer thereto, Defendants assert that federal employees engaged in a business, vocation, occupation, calling or profession are treated exactly the same as all other persons without regard to the nature of their employer. That is, only those federal employees that are not required by law to pay any license or privilege tax to either the State of Alabama or the County by any of the foregoing quoted provisions are subject to the occupational tax.

The purpose of Act No. 406 was to authorize the County to impose a license or privilege tax upon persons who are engaging in such businesses, vocations, occupations, callings and professions without paying any license tax through either the State or County.

Additionally, the rate of the Jefferson County Occupational Tax is exactly the same for all persons subject thereto. Said rate is .05 percent of the gross receipts of such persons earned in Jefferson County. There is no difference in rate between persons employed by the fed-

eral government and all other persons who are subject to the tax.

16. Defendants deny paragraph 18. For further answer Defendants assert that Defendants have instituted a reasonable and orderly procedure to effect collection of the occupational tax. Substantial start up work and effort has been required to develop the required information so as to identify those persons subject to the tax and to initiate tax withholding procedures by employers in the County. Substantial efforts were required to achieve such withholding action by the federal employers in Jefferson County. No exceptions from the tax beyond those required by Act No. 406 have been established or allowed. A program to collect arrearages from persons who have failed or refused to pay the tax as required by law is ongoing.

17. Defendants deny paragraph 19.

18. For answer to paragraph 20 of the Complaint, Defendants deny that they have deprived Plaintiffs of any right, privilege or immunity secured by the Constitution or laws of the United State of America.

19. Denied.

20. For answer to paragraph 22 of the Complaint, Defendants admit that the occupational tax at issue in this case has been previously challenged in the state courts on both federal and state constitutional claims. Defendants aver that the occupational tax at issue in this case has already been held constitutional by the Alabama Supreme Court in the case *Beddingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988). Further, that the Plaintiffs in *Beddingfield* had the opportunity to appeal the *Beddingfield* decision of the Alabama Supreme Court to the Supreme Court of the United State, which opportunity said Plaintiffs failed to pursue and thereby waived and forfeited and which decision of the Alabama Supreme

Court is now a matter adjudged and conclusive upon and res judicata to all of the rights of Plaintiffs asserted herein. Defendants deny the remaining allegations of paragraph 22 of the Complaint.

21. Denied.

22. For answer to paragraph 24 of the Complaint, Defendants deny that they have deprived Plaintiffs of any right, privilege or immunity secured by the Constitution or laws of the United States of America.

23. Denied.

24. For answer to paragraph 26 of the Complaint, Defendants admit that the occupational tax at issue in this case has been previously challenged in the state courts on both federal and state constitutional claims. The Alabama Supreme Court has held that the occupational tax at issue in this case is constitutional. *Beddingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988). Defendants deny the remaining allegations of paragraph 26 of the Complaint.

25. Denied.

26. Denied.

27. Denied.

28. Denied.

29. Denied.

30. Defendants deny each and every remaining allegations of the Complaint and demand strict proof thereof.

SECOND DEFENSE

Res Judicata

Defendants plead the affirmative defense of res judicata as a complete or partial bar to the causes of action set forth in the Complaint.

THIRD DEFENSE

Collateral Estoppel

Defendants plead the affirmative defense of collateral estoppel to the causes of action set forth in the Complaint.

FOURTH DEFENSE

Non Claim Statute

Defendants plead the Alabama non claim statute as a complete or partial bar to the relief requested in the Complaint.

FIFTH DEFENSE

Laches

Defendants plead the defense of laches as a complete or partial bar to the causes of action set forth in the Complaint.

SIXTH DEFENSE

Statute of Limitations

Defendants plead the applicable statute of limitations as a complete or partial bar to the relief sought in the Complaint.

SEVENTH DEFENSE

No Deprivation of Federally Protected Right

Defendants aver that Plaintiffs have not been deprived of any right, privilege or immunity secured by the Constitution or laws of the United States of America.

EIGHTH DEFENSE

Voluntary Payment

Defendants aver that all payments made by named Plaintiffs have been voluntary.

NINTH DEFENSE

No Buck Act Violation

Defendants plead the provisions of 4 U.S.C. § 106 as a defense to Plaintiffs' Buck Act claims.

TENTH DEFENSE

Immunity

Defendant, Godeke, pleads the defense of immunity whether absolute, qualified, good faith or discretionary function.

ELEVENTH DEFENSE

Waiver

Defendants plead the affirmative defense of waiver as a complete or partial bar to the causes of action set forth in the Complaint.

TWELFTH DEFENSE

General Defenses

1. Defendants assert that the Complaint fails to state a cause of action upon which relief can be granted.

2. Defendants plead good faith in all their dealings with Plaintiffs.

3. Defendants plead the general issue.

/s/ Edwin A. Strickland

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/s/ Jeffrey M. Sewell

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/s/ Charles S. Wagner

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CERTIFICATE OF SERVICE

I have served a copy of the foregoing **ANSWER** on counsel for all parties, by placing same in the U.S. Mail, postage prepaid and properly addressed, this the 29 day of May, 1992.

/s/ Jeffrey M. Sewell

JEFFREY M. SEWELL
Assistant County Attorney

cc: William J. Baxley
Joel E. Dillard
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Gorham, Waldrep, Stewart, Kendrick,
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Act No. 406

AN ACT

To authorize the governing body of any county of the state having a population of 500,000 or more, according to the last or any subsequent Federal census, to levy a business or privilege tax upon any business, vocation, occupation, calling or profession for which a license or privilege tax is not required for either the State of Alabama or the county by the laws of the State of Alabama, and to limit the amount of any such business or privilege tax.

Be It Enacted by the Legislature of Alabama:

Section 1. This Act shall apply to any county of the State of Alabama having a population of 500,000 or more, according to the last or any subsequent federal census, and to no other county.

Section 2. As used in this Act, the following words and terms have the meanings hereby ascribed to them; "the county" means a county subject to this Act; "the governing body" means the governing body of the county, whether it be a county commission, board of revenue or other governing body; "person" includes any natural person, corporation, firm, association or other entity; and "business" includes business, vocation, occupation, calling or profession; "license or privilege tax" shall not include any sales or use tax.

Section 3. The purpose of this Act is to equalize the burden of taxation by authorizing the county to impose a license or privilege tax upon persons now engaging in certain businesses without paying any license tax thereon to either the state or county.

Section 4. The governing body of the county is hereby authorized to levy a license or privilege tax upon any person for engaging in any business for which he is not required by law to pay any license or privilege tax to

either the State of Alabama or the county by any of the following Article 1, Chapter 20, Title 51; Sections 176, 177, 178, 180, 182, 183, 184, 186, 429, and 826 in Title 51 of the Code of Alabama of 1940 as amended.

When a person is engaged in more than one business for one or more of which a license or privilege tax is required to be paid to the State or the county but for one or more of which no license or privilege tax is required to be paid to the State or county, the county governing body shall have the authority to levy a license or privilege tax upon that business, or those businesses, for engaging in which such person is not required to pay any license or privilege tax to the State or county.

Section 5. The tax hereby levied shall be paid to that officer or employee of the county chargeable with the duty of collecting license or privilege taxes payable to the county.

Section 6. No license or privilege tax levied by the governing body of the county on any person, for engaging in any business shall be at a rate which is in excess of the rate of license or privilege tax levied by the largest municipality of the county on the same or similar type of business activity.

Section 7. It is hereby provided that all laws or parts of law in conflict with provisions of this Act are hereby repealed to the extent of such conflict.

Section 8. The provisions of this Act are severable; and should any part of this Act be declared unconstitutional or void, such declaration shall not affect the remaining provisions.

Section 9. This Act shall become effective upon its approval by the Governor or upon its otherwise becoming a law.

Approved September 7, 1967.

Time: 10:37 A.M.

ORDINANCE NO. 1120

An Ordinance to establish a license or privilege tax on persons engaged in any vocation, occupation, calling or profession in Jefferson County who is not required by law to pay any license or privilege tax to either the State of Alabama or the County as set out herein.

BE IT RESOLED AND ORDAINED by the Jefferson County Commission as follows:

Section 1. DEFINITIONS. That the following words, when used in this Ordinance, shall have the meaning ascribed to them, except where the context clearly indicates or requires a different meaning:

(A) The word "person" shall mean any natural person. Whenever the word "person" is used in any clause prescribing and imposing a penalty in the nature of a fine or imprisonment, the work as applied to a partnership or other form of unincorporated enterprise shall mean the partners or members thereof, and as applied to corporations shall mean the officers and directors thereof.

(B) The words "vocation, occupation, calling and profession" shall mean and include the doing of any kind of work, the rendering of any kind of personal services, or the holding of any kind of position or job within Jefferson County, Alabama, by any clerk, laborer, tradesman, manager, official or other employee, including any nonresident of Jefferson County who is employed by any employer as defined in this section, where the relationship between the individual performing the services and the person for whom such services are rendered is, as to those services, the legal relationship of employer and employee, including also a partner of a firm or an officer of a firm or corporation, if such partner or officer receives a salary for his personal services rendered in the business of such firm or corporation, but they shall not mean or include domestic servants employed in private homes

and shall not include businesses, professions or occupations for which license fees are required to be paid under any General License Code of the County or to the State of Alabama or the County by any of the following: Chapter 12, Article 2, Title 40; §§40-21-50, 40-21-52, 53, 54 and 55; 40-21-57, 58, 59, and 60; 40-16-6; and 27-4-9 of the Code of Ala. 1975, as amended.

(C) The words "vocation, occupation, calling and profession" shall also mean and include the holding of any kind of office or position either by election or appointment, by any federal, state, county or city officer or employee where the services of such official or employee are rendered within Jefferson County, Alabama.

(D) The word "employee" shall mean and include any person engaging in or following any vocation, occupation, calling or profession within the meaning of subsection (B) of Section 1 of this Resolution and Ordinance.

(E) The word "employer" shall mean and include any person, business, firm, corporation, partnership, association or any other kind of organization who or that employs any person in any vocation, occupation, calling or profession in Jefferson County, Alabama, within the meaning of subsection (B) of Section 1 of this Ordinance.

(F) The words "gross receipts" and "compensation" shall have the same meaning, and both words shall mean and include the total gross amount of all salaries, wages, commissions, bonuses or other money payment of any kind, or any other consideration having monetary value, which a person receives from or is entitled to receive from or be given credit for by his employer for any work done or personal services rendered in any vocation, occupation, calling or profession, including any kind of deductions before "take home" pay is received; but the words "gross receipts" and "compensation" shall not mean or include amounts paid to traveling salesmen or

other workers as allowance or reimbursement for traveling or other expenses incurred in the business of the employer, except to the extent of the excess of such amounts over such expenses actually incurred and accounted for by employee to the employer.

(G) The word "licensee" shall mean and include any person required to file a return or to pay a license fee under this ordinance.

(H) The word "county" shall mean Jefferson County, Alabama.

(I) The words "Director of Revenue" shall mean the Director of Revenue of Jefferson County, Alabama.

(J) The singular shall include the plural and vice versa, and the masculine shall include the feminine and the neuter.

Section 2. LICENSE FEES REQUIRED. It shall be unlawful for any person to engage in or follow any vocation, occupation, calling or profession as defined in Section 1 within the County on and after the 1st day of January, 1988, without paying license fees to the County for the privilege of engaging in or following such vocation, occupation, calling or profession, which license fees shall be measured by one-half percent (1/2%) of the gross receipts of each such person.

Section 3. WHERE WORK DONE OR SERVICES PERFORMED BOTH WITHIN AND WITHOUT THE COUNTY. In cases where compensation is earned as a result of work done or services performed both within and without the county, the license fees required under this Ordinance shall be computed by determining upon the Oath of the employer, or if required by the Director of Revenue upon the oath of the employee, that percentage of the compensation earned from the proportion of the work which was done or performed within the County.

Section 4. EMPLOYERS TO WITHHOLD LICENSE FEES AND FILE RETURNS. Each employer shall deduct from each payment due each employee the amount of the license fees measured by one-half per centum (1/2%) of the compensation due each employee beginning on the 1st day of January, 1988. The payments required to be made on account of such deductions by employers shall be made monthly to the County for the monthly periods ending January 31, February 28, March 31, April 30, May 31, June 30, July 31, August 31, September 30, October 31, November 30 and December 31st of each year, on or before the twentieth day of the month next following the end of each such monthly period, and each employer shall at the same time make a return in connection therewith on a form made available to such employer by the Director of Revenue at the office of the Director of Revenue, provided that, if the total amount deducted from payments made to or due all employees of an employer is less than fifty ($50.00) dollars during each calendar month of the previous calendar year, then such employer may elect, for the current calendar year, to remit such deductions to the County for the quarterly periods ending March 31st, June 30th, September 30th and December 31st of such following calendar year, on or before the twentieth day of the month next following the end of each such quarterly period, and each such employer shall at the same time make a return in connection therewith on a form made available to such employer by the Director of Revenue at the office of Director of Revenue. Provided, however, that the failure or omission by any employer to deduct such license fees shall not relieve an employee from the payment of such license fees and compliance with the requirements for making returns as provided in this Ordinance, or with any regulations promulgated under this Ordinance. Each employer shall file in the office of the Director of Rev-

enue on or before January 31, of each year a return on a form made available by said Director of Revenue, at the office of said Director of Revenue, which return shall show the gross amount of compensation of each employee, the amount of license fees deducted and paid by such employer for all or any part of the preceding calendar year and the last known address of each such employee. Each employer shall keep accurate records of all such compensation, deductions, license fees, payments and returns. Such records shall be kept and maintained by each such employer for not less than five (5) years subsequent to the date such compensation was earned.

Section 5. RETURNS TO BE FILED BY EMPLOYEES. When a monthly or quarterly return, as required by Section 4 hereof is not filed by an employer and the license fees are not paid to the County by such employer monthly as herein provided, the employee for whom no return has been filed and no payment has been made shall file a return with the Director of Revenue on or before the 1st day of the second month next following the end of each such monthly or quarterly period, showing in said return his gross receipts subject to license fees for such month or quarter, and he shall also file a return with the Director of Revenue on or before January 31st of each year thereafter in which his employer has failed to file any monthly or quarterly return required in the preceding calendar year, showing on said return the gross receipts subject to license fees during the preceding calendar year. If for any reason all license fees of a person subject to the provisions of this Ordinance were not withheld by his employer from his gross receipts, such person shall file each return required by this Section on a form obtainable at the office of the Director of Revenue. In addition to the gross receipts earned by him, such return shall show such other pertinent information as may be required by the Director of Revenue. Each

person making a return required by the Section shall, at the time of filing thereof, pay to the County the amount of license fees due under this Ordinance; provided, however, that any portion of the license fees deducted at the source shall be deducted on the return and only the balance, if any, shall be due and payable at the time of filing said return. Each employee shall keep accurate records of all such compensation, deductions, license fees, payments and returns. Such records shall be kept and maintained by each such employee for not less than five (5) years subsequent to the date such compensation was earned.

Section 6. DUTIES OF THE DIRECTOR OF REVENUE. It shall be the duty of the Director of Revenue to collect and receive all license fees imposed by this Ordinance and to keep records showing the amounts received by him from each employer. All moneys received by the Director of Revenue shall be deposited in a duly approved depository.

Section 7. INVESTIGATIVE POWERS OF THE DIRECTOR OF REVENUE. The Director of Revenue or any agent or employee designated by him is hereby authorized to examine the books, papers and records of any employer or supposed employer, or of any license or supposed license, in order to determine the accuracy of any return made, or if no return was made to ascertain the amount of license fees due under the terms of this Ordinance by such examination. Each such employer or supposed employer or licensee or supposed licensee shall give to the Director of Revenue, or to his duly authorized agent or employee, the means, facilities and opportunities for the making of such examination and investigation. The Director of Revenue is hereby authorized to examine any person under oath concerning any gross receipts which were or should have been shown in a return, and to this end he may compel the production of

books, papers, records and the attendance of all persons before him, whether as parties or as witnesses, whom he believes to have knowledge of such gross receipts or compensation.

Section 8. REGULATIONS MAY BE PROMULGATED. The Director of Revenue may prescribe, adopt, promulgate and enforce reasonable rules and regulations not in conflict with this Ordinance relating to any matter or thing pertaining to the administration and enforcement of the provisions of this Ordinance, including but not limited to provisions for the re-examination and correction of returns as to which overpayment or underpayment is claimed or found to have been made, and the regulations so promulgated shall be binding upon all licensees and employers.

Section 9. INFORMATION TO BE CONFIDENTIAL. Notwithstanding any resolutions and ordinances to the contrary, any information gained by the Director of Revenue or any other official or agent or employee of the County as a result of any returns, investigations, hearings, or verifications required or authorized by this Ordinance shall be confidential, except for official purposes, or in accordance with proper judicial order, or the enforcement of this Ordinance, and any person or agent divulging such information, except as herein permitted, shall upon conviction be subject to a fine of not more than One Hundred Dollars ($100.00) or to imprisonment of not exceeding thirty (30) days, or to both such fine and imprisonment.

Section 10. INTEREST AND PENALTIES.

(A) All license fees imposed by this Ordinance which are delinquent, that is, which remain unpaid after they become due shall, subject to the provisions hereinafter set out, bear interest at the rate of twelve percentum

(12%) per annum, and any person who has failed to pay such license fees when the same became due shall, subject to the provisions hereinafter set out, also be charged a penalty of ten percentum (10%) of the amount of such unpaid license fees. Any person or employer who fails or refuses to withhold any license fees payable under this Ordinance, or who fails to pay such fees after withholding the same to the County at the time it is due, as provided under the provisions of Section 4 hereof, shall become liable to the County for such fees, as well as for the interest thereon at the rate of twelve percentum (12%) per annum, and for the aforesaid penalty. Provided, however, that the minimum penalty imposed against such person or employer shall be Three Dollars ($3.00). Provided the Director of Revenue, if a good and sufficient reason is shown for the failure to pay the tax within the time required, may waive or remit the penalty and interest, or a portion of either, upon payment of the tax due.

(B) Any person or employee who shall fail, neglect or refuse to pay a license fee as by this Ordinance required, or any employer who shall fail to withhold said license fees, or to pay over to County such license fees, penalties or interest imposed by this Ordinance, or any person required to file a return under the provisions of Section 5 of this Ordinance, who shall fail, neglect or refuse to file such return, or any person or employer who shall refuse to permit the Director of Revenue or any agent or employee designated by him, in writing, to examine his books, records and papers for any purpose authorized by this Ordinance, or who shall knowingly make any incomplete, false or fraudulent return, or who shall attempt to do anything whatever to avoid the full disclosure of the amount of gross receipts or compensation in order to avoid the payment of the whole or any part of a license fee, shall upon conviction be subject to punishment within the limits of and as provided by law

for each offense. Such punishment shall be in addition to the penalties imposed under subsection (A) of this section.

Section 11. EXTENSION OF TIME FOR MAKING RETURN. The Director of Revenue, for good cause, may extend the time for making any return required under the provisions of this Ordinance, but the time for filing any such return shall not be extended for a greater period than thirty (30) days from the day such return is due to be made and shall not prevent penalty and interest from accruing during the period of such extension.

Section 12. USE OF LICENSE FEES. All money derived from license fees under the provisions of this Ordinance shall be paid to the General Fund of the County and expended as authorized by law.

Section 13. SEVERABILITY. The provisions of this Ordinance are severable. If any provision, section, paragraph, sentence or part thereof, or the application thereof to any employer or licensee or class or persons, shall be held unconstitutional or invalid, such decision shall not affect or impair the remainder of the Ordinance, it being the legislative intent to ordain and enact each provision, section, paragraph, sentence and part thereof, separately and independently of each other.

Section 14. REPEAL OF RESOLUTION AND ORDINANCES. All resolutions and ordinances or parts of resolutions and ordinances in conflict with this Ordinance are to the extent of such conflict hereby repealed.

Section 15. EFFECTIVE DATE. This Ordinance shall be in full force and effect on and after January 1, 1988, and from year to year thereafter, until repealed.

Hoyt BEDDINGFIELD, Jr., in his capacity as the acting director of finance of the City of Birmingham, et al.

v.

JEFFERSON COUNTY, et al.

87-316.

Supreme Court of Alabama.

May 20, 1988.

City Challenged constitutionality of county ordinance establishing occupational tax. The Circuit Court, Jefferson County, Braxton L. Kittrell, Jr., J., upheld ordinance, and appeal was taken. The Supreme Court, Beatty, J., held that: (1) statute authorized county to levy occupational tax; (2) statute was general, rather than local legislation; and (3) statute authorizing levy of tax provided for collection of such tax.

Affirmed.

BEATTY, Justice.

This is an appeal by Hoyt Beddingfield, Jr., as acting director of finance of the City of Birmingham, and the City of Birmingham from a judgment upholding a Jefferson County ordinance, specifically Ordinance No. 1120, establishing an occupational tax. We affirm.

The action was filed on October 19, 1987, and was consolidated for trial with the case of *Carolyn Phillips, et al. v. Jefferson County Commission.*

Ordinance No. 1120 levies a license or privilege tax on natural persons engaged in any vocation, occupation, calling, or profession who are not required by law to pay any license or privilege tax to the state or county. This tax was promulgated by Jefferson County under the authority of Act No. 406, approved September 7, 1967, *Acts of Alabama 1967,* at 21-23. Pertinent sections thereof are quoted below:

"AN ACT

"To authorize the governing body of any county of the State having a population of 500,000 or more, according to the last or any subsequent Federal census, to levy a business or privilege tax upon any business, vocation, occupation, calling or profession for which a license or privilege tax is not required for either the State of Alabama or the county by the laws of the State of Alabama, and to limit the amount of any such business or privilege tax.

"Be It Enacted by the Legislature of Alabama:

"Section 1. This Act shall apply to any county of the State of Alabama having a population of 500,000 or more, according to the last or any subsequent federal census, and to no other county.

". . .

"Section 3. The purpose of this Act is to equalize the burden of taxation by authorizing the county to impose a license or privilege tax upon persons now engaging in certain businesses without paying any license tax thereon to either the state or county.

"Section 4. The governing body of the county is hereby authorized to levy a licenuse or privilege tax upon any person for engaging in any business for which he is not required by law to pay any license or privilege tax to either the State of Alabama or the county by any of the following: Article 1, Chapter 20, Title 51; Sections 176, 177, 178, 180, 182, 183, 184, 186, 429, and 826 in Title 51 of the Code of Alabama of 1940 as amended.

"When a person is engaged in more than one business for one or more of which a license or privilege tax is required to be paid t the State or the county but for one or more of which no

license or privilege tax is required to be paid to the State or county, the county governing body shall have the authority to levy a license or privilege tax upon that business, or those businesses, for engaging in which such person is not required to pay any license or privilege tax to the State or county.

"Section 5. The tax hereby levied shall be paid to that officer or employee of the county chargeable with the duty of collecting license or privilege taxes payable to the county.

"Section 6. No license or privilege tax levied by the governing body of the county on any person, for engaging in any business shall be at a rate which is in excess of the rate of license or privilege tax levied by the largest municipality of the county on the same or similar type of business activity."

Allegations of unconstitutionality made below were denied by the defendants. Following discovery, testimony taken in open court, and stipulation, the Jefferson Circuit Court upheld the ordinance, and this appeal followed. Because a number of issues are presented here, weshall treat them *seriatim.*

I.

Did Act No. 406 manifest a legislative intent to authorize Jefferson County to levy an occupational tax?

Plaintiffs' argument here is multifaceted. First, they contend that the stated purpose of the Act is to authorize a tax only upon "certain businesses," and not "occupations." Further, plaintiffs argue that § 6 of Act No. 406 does not permit a privilege tax "which is in excess of the rate of license or privilege tax levied by the largest municipality of the County on the same or similar type of business activity," meaning that Jefferson County could

not implement the Act by levying a tax in excess of that which had been levied by Birmingham. Because Birmingham had no such privilege tax in 1967, plaintiffs argue, any county tax under Act No. 406 would offend the Act. Finally, according to plaintiffs, the county's own implementation of the Act when it was enacted in 1967, as only a licensing code authorizing licensing of certain businesses, gives weight to the limiting nature of Act No. 406.

We must respectfully reject these argument. While we are mindful that taxing statutes are to be strictly construed, *State v. Seals Piano Co.*, 209 Ala. 93, 95 So. 451 (1923), it does not offend that principle to uphold this statute. Indeed, the express language of the Act authorizes the county "to levy a business or privilege tax upon any business, vocation, occupation, calling or profession." When the intention of the legislature is so apparent from the face of a statute that there can be no question as to its meaning, there is no room for construction. *American Institute of Psychotherapy v. Alabama Board of Examiners in Psychology*, 410 So.2d 54 (Ala. 1982). Thus, § 4 is to be read as authorizing a privilege tax "upon any person for engaging in any business [or occupation]."

Municipal licensing authority has existed at least since the Code of 1907, see Code of 1975, § 11-51-90. Birmingham originally adopted its licensing code as early as 1916, and in 1967 it had an extensive catalog of business categories subject thereto. However, it was not until 1970 that Birmingham itself adopted Ordinance No. 70-76, providing for a license fee for occupations and professions. Given the fact that Birmingham had possessed the authority under state law to impose an occupational privilege tax since 1907, it is clear that by § 6 of Act No. 406 the legislature, cognizant of that power, decided to restrict the county's authority to a maximum as established by Birmingham's occupational privilege tax. It is a fundamental principle that the legislature, in enacting a

statute, is presumed to have full knowledge and information on prior and existing law on the subject of the statute. *Ex parte Love* 513 So.2d 24 (Ala. 1987). Thus, we cannot agree with plaintiffs that Act. No. 406 required Jefferson County to implement its authority contemporaneously thereunder, or lose it altogether. The Act itself contains no such limiting language. True, Jefferson County did not implement the "occupational" aspect of the statute until 1987. Nevertheless, the authority to do so continued.[1]

Finally, we are not persuaded by plaintiffs' argument that, in construing Act No. 406, this Court should defer to the county's alleged contemporaneous interpretation of the Act. Because we do not find the Act doubtful in its meaning, we need not resort to an alleged contemporaneous interpretation by the county.

II.

Is Act No. 406 unconstitutional as violating limitations on local legislation as explained in *Peddycoart v. City of Birmingham*, 354 So.2d 808 (Ala. 1978)?

According to plaintiffs, Act No. 406 violates the mandate of *Peddycoart* in two respects: (1) the general laws of Alabama have preempted the field of license and privilege taxation to prevent reliance upon local legislation, and thus Act No. 406 violates Section 105 of the Constitution; and (2) the population classification of Act No. 406 (500,000 or more), which makes it a "bracket bill," lacks a reasonable relationship with the statute's purpose.

Commenting upon *peddycoart* in *Freeman v. Purvis*, 400 So.2d 389 (Ala. 1981), this Court stated:

---

[1] By stipulation, it was established that, while Birmingham itself adopted its license code as early as 1916, and possessed an extensive license code in 1967, it did not establish its occupational tax until 1970.

"We must point out, however, that following the *Peddycoart* decision which was released on January 13, 1978, two amendments to the Alabama Constitution of 1901 were ratified by the people: Amendment No. 375, ratified on November 20, 1978, and Amendment No. 389, ratified on November 4, 1980. Because the latter Amendment is pertinent, we quote it here:

> "Any statute that was otherwise valid and constitutional that was enacted before January 13, 1978, by the legislature of this state and was a general act of local application on a population basis, that applied only to a certain county or counties or a municipality or municipalities of this state, shall not be declared invalid or unconstitutional by any court of this state because it was not properly advertised in compliance with section 106 of this Constitution.
>
> "'All such population based acts shall forever apply only to the county or counties or municipality or municipalities to which they applied on January 13, 1978, and no other, despite changes in population.'
>
> ". . .
>
> "The effect of this Amendment was to validate all 'bracket bills' enacted without advertising before January 13, 1978, the date of the *Peddycoart* decision, and which were not otherwise unconstitutional . . ."

Act No. 406 was approved in 1967, well before the date of the *Peddycoart* decision of January 13, 1978, and, as a general law of local application, was validated by Amendment 389 even though it was not advertised under Section 106 of the Constitution of 1901.

Even under pre-*Peddycoart* standards, Act No. 406 must survive a constitutional attack based on a supposed lack

of relationship between its purpose and the expressed population classification. As observed in *Dearborn v. Johnson*, 234 Ala. 84, 173 So. 864 (1937), on that subject, much is left to legislative discretion in fixing that classification and in recognizing that purpose. In *Coach v. Rodgers*, 253 Ala. 533, 45 So.2d 699 (1950), this Court reviewed a number of its decisions that had upheld "bracket bills" of substantial minimum, but no maximum, population classifications:

> "We have numerous decisions which give illustration to the principle. We will not undertake to analyze them all, but only such as seem to shed light upon the instant suit. In the case of *Wages v. State*, 225 Ala. 2, 141 So. 707 708 [1932], this Court was dealing with an act similar to the one here involved. By its terms it had application to counties having a population of three hundred thousand or more according to the last or any subsequent federal census. The Court there undertook to apply the principle which we have stated above. The act was held to be general, although it then applied only to Jefferson County. We quote from that opinion as follows: 'The wisdom of the law and the necessity for its enactment and the classification adopted were addressed to the lawmaking body. It may be well said, this body understood and appreciated the necessity of furnishing protection to the people in the matter legislated upon in the act, in the larger and more populous counties of the state, which was not necessary or practicable in the smaller counties.'
>
> "We have numerous cases which bring out that application of the principle wherein it was observed that counties of large population may reasonably be supposed to be differently served in many respects than counties of smaller population and there is sometimes drawn a distinc-

tion between a classification based upon a minimum population and a classification based upon a population with both a minimum and a maximum limit. The case of *State ex rel. Shirley v. Lutz*, 226 Ala. 497, 147 So. 429 [1933], brings out that distinction. That case was dealing with an act regulating the business of plumbing in counties having a population of 100,000 or more according to the last or any subsequent federal census. The Court emphasized the different principles applicable when there is only a minimum but not a maximum number. When there is only a minimum, the Court thought a more liberal application of the principle should be made.

". . .

"*In the Opinion of the Justices*, 249 Ala. 511, 31 So.2d 721, we were responding to a legislative inquiry as to a proposed act applicable to counties of 400,000 population or more according to the last or any subsequent federal census, which would require the payment to such counties of a license tax of one cent on each gallon of gasoline. We thought there was a reasonable relation of the subject matter of the Act to counties of such population because we thought that in large counties the load of traffic on the highways by reason of such population justified the legislature in providing additional income in order to take care of its effect."

It is clear from the terms of Act No. 406 that its purpose was to provide more populous counties with a source of revenue by authorizing them to impose a privilege or license tax. The record establishes, if common sense does not, that needs and demands for services made upon county governments keep pace with urbanization and increases in population, necessitating new

opportunities for revenue. It follows that populous counties experience greater demands for costly services than those sparsely populated. In this case, therefore, the requisite relationship was established. *Peddycoart, supra.*

Is Act No. 406 unconstitutional under § 105, Constitution of 1901?

Plaintiffs maintain that Act No. 406 is constitutional under Section 105, Constitutional of 1901. The pertinent part of that section states that "[n]o special, private, or local law . . . shall be enacted in any case which is provided for by a general law." Plaintiffs reason that Act No. 406 is infirm under that provision because of the prior enactment of Article I, Chapter 20, Title 51, Code of 1940, now Article II, Chapter 12, Title 40, Code of 1975, which provides:

> "Every person, firm, company, corporation or association, receiver or trustee, but not a governmental subdivision, engaged in any business, vocation, occupation, calling or profession herein enumerated or who shall exercise any privilege hereinafter described for which a license or privilege tax is required shall first procure a state license, and a county license when so required, and shall pay for the same or shall pay for the exercise of such privilege the amounts hereinafter provided, and comply with all other provisions of this title."

Section 40-12-40, Code of 1975.

Act No. 406, as we have stated, is a general law, not a local law; thus Section 105 is inapplicable.

III.

Finally, plaintiffs contend that Act No. 406 fails for want of an express provision therein for the collection of an occupational tax. Plaintiffs argue further that a read-

ing of Act No. 406 to so provide would violate Section 104(15) of the Constitution of 1901, which prohibits the enactment of a local law "[r]egulating either the assessment or collection of taxes."

For the reasons previously discussed, Act No. 406 is a general, not a local, law; hence, this provision, Section 104(15), is inapplicable. And, as the trial court found:

> "The Courts have long held that there is a distinction between the terms 'assessment' and 'levy' and held that 'assessment,' as used in Subdivision (15), relates to property taxes rather than privilege taxes. *Opinion of the Justices,* 266 Ala. 363, 369, 96 So.2d 634 (1957) (quoting *Standard Oil Co. v. Limestone County,* 220 Ala. 231, 234-235, 124 So. 523 (1929)."

Moreover, the grant of authority to "levy a license or privilege tax upon any person" in § 4 of Act No. 406 was in itself authority to collect such a tax. Cf., *Syracuse Trust Co. v. Board of Supervisors,* 13 N.Y.S.2d 390 (Sup.Ct.), *affirmed,* 258 A.D. 17, 15 N.Y.S.2d 920 (1939); to "levy" is to "collect" a tax. *Black's Law Dictionary* (5th ed. 1979) at 816.

Let the judgment be affirmed.
AFFIRMED.

TORBERT, C.J., and MADDOX, JONES, ALMON, SHORES and ADAMS, JJ., concur.

Supreme Court, U.S.
FILED
OCT 11 1995
CLERK

No. 95-386

In The

Supreme Court of the United States

October Term, 1995

JASON RICHARDS and FANNIE HILL,

Petitioners,

v.

JEFFERSON COUNTY, ALABAMA and BIRMINGHAM-JEFFERSON CIVIC CENTER AUTHORITY,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I.

Did the Alabama Supreme Court correctly hold that Petitioners' constitutional challenges to Act 406 and Ordinance 1120 are barred by *res judicata*?

A. Are Petitioners in privity with the earlier plaintiffs in *Bedingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988)?

B. Are the causes of action in the instant case and in the earlier *Bedingfield* case substantially the same?

CERTIFICATE OF INTERESTED PERSONS

Respondent's Counsel	Edwin A. Strickland Jeffrey M. Sewell Charles S. Wagner
Intervenor's Counsel	William Slaughter Charlie D. Waldrep Thomas L. Stewart
Petitioner's Counsel	William J. Baxley Joel E. Dillard
Respondents	Jefferson County, Alabama Birmingham-Jefferson Civic Center Authority (BJCC)
Petitioners	Jason Richards Fannie Hill A putative class of taxpayers
Trial Judge	Honorable John Rochester
Supreme Court of Alabama:	Honorable Sonny Hornsby Honorable Hugh Maddox Honorable Reneau Almon Honorable Janie Shores Honorable J. Gorman Houston Honorable Mark Kennedy Honorable Kenneth Ingram Honorable Ralph Cook Honorable Terry Butts

No other persons are known to have participated directly or indirectly in the appeal of this matter.

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CITATIONS OF THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The opinions and judgments delivered in the courts below are contained in the appendix to this brief.

STATEMENT OF GROUNDS OF JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257 in that this is a petition for certiorari from a decision of the Supreme Court of Alabama in a civil case. However, the jurisdictional requirement set forth at Supreme Court Rule 10(c), is not satisfied. That is because the decision of the Alabama Supreme Court in the instant case does *not* conflict with applicable decisions of this Court. As set forth in this BRIEF the decision of the Alabama Supreme Court in the instant case is, in all respects, consistent with the applicable decisions of this Court.

STATEMENT OF STATUTES AND ORDINANCES INVOLVED IN APPEAL

This case involves Alabama Act 406 (1967) and Jefferson County Ordinance 1120 which are contained in the appendix to this brief.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is the second declaratory judgment action challenging the constitutionality of Alabama Act 406 (Legislature 1967) (hereinafter "Act 406") and Jefferson County Ordinance 1120 (hereafter "Ordinance 1120"). Act 406 authorizes the Jefferson County Commission to levy a County occupational tax on all persons who earn wages in the County who are not required to pay the state business license pursuant to the state business license code, Chapter 12, Title 40, Alabama Code (1975). Ordinance 1120 levies the County occupational tax at the rate of .005 (1/2 of 1%) on all wages earned by persons within the geographic boundary of the County who are not required by the state business license code to pay state business license tax.

II. THE PRIOR SUIT

In October, 1987, the City of Birmingham, Alabama and Hoyt Bedingfield, individually and in his official capacity as the Finance Director for the City of Birmingham, filed suit in state court against Jefferson County, Alabama and the Jefferson County Commission and alleged that Act 406 and Ordinance 1120 violated both the state and federal constitutions and were, therefore, void. The verified complaint stated a cause of action under the Alabama Declaratory Judgment Act, § 6-6-220, Alabama Code (1975); §§ 44, 45, 71, 104, 105, 212, Alabama Constitution (1901); and, the ***equal protection*** and

due process clauses of both the United States and Alabama constitutions. [*Bedingfield* complaint at R.237-243, also contained in the appendix to this brief.]

Also, in October, 1987, Carolyn Phillips, John Rogers and Dale Patton, all individuals, filed a second suit against the Jefferson County Commission in state court and also alleged that Act 406 and Ordinance 1120 violated the ***due process clause, the equal protection clause and the Fourteenth Amendment to the United States Constitution.*** [Complaint at R.245-249, also contained in the appendix to this brief.]

In November, 1987, Phillips, Rogers and Patton amended their complaint to expand their ***federal equal protection and due process claims*** and to add federal civil rights claims pursuant to 42 U.S.C. § 1983 and § 1988. [Amended Complaint at R.250-255, also contained in the appendix to this brief.]

The cases were consolidated and were tried in December, 1987. Final judgment was entered in favor of the County on December 11, 1987. [Final Order at R.265-269.]

The consolidated cases were appealed to the Alabama Supreme Court. In their brief, the *Bedingfield* plaintiffs argued that Act 406 and Ordinance 1120 violated the federal constitution. [Excerpts of *Bedingfield* briefs at R.271-283, also contained in the appendix to this brief.]

The Alabama Supreme Court permitted amicus briefs from the Birmingham Area Chamber of Commerce, the Alabama AFL-CIO, the Laborers' International Union of North America, Local 1317, and Shelby County, Alabama.

All of the amicus briefs asserted federal equal protection challenges against the occupational tax. [Amicus brief excerpts at R.285-330, also contained in the appendix to this brief.]

On May 20, 1988, the Alabama Supreme Court released its opinion wherein it affirmed the trial court and held that Act 406 and Ordinance 1120 were constitutional. [*Bedingfield* Opinion at R.231-235, also contained in the appendix to this brief.]

The County Commission implemented Ordinance 1120 and has collected the occupational tax from January 1, 1988, to the present. The proceeds of the tax finance thousands of jobs and hundreds of public contracts, including the indebtedness of the Birmingham-Jefferson Civic Center Authority.

III. THE INSTANT SUIT

On April 21, 1992, the instant suit was filed as a class action on behalf of one class of federal employees who are subject to the County tax and one class of all other workers subject to the County tax. The instant suit alleges that the County tax violates the equal protection clause of the federal constitution, several provisions of the Alabama Constitution and, with regard to federal employees, also violates the Buck Act, 4 U.S.C. § 111. [Instant Complaint at R.1-18]

On June 4, 1992, the County moved for summary judgment contending that all the claims (except the federal employees' Buck Act claim) were barred by the doctrine of *res judicata*. Specifically, the County asserted that the *Bedingfield* decision was:

1. A prior judgment on the merits.
2. Rendered by court of competent jurisdiction.
3. That the instant Plaintiffs are in privity with the *Bedingfield* plaintiffs.
4. That the two cases involve substantially the same cause of action.

The County contended that all of the claims which either were raised or *could have been* raised in the *Bedingfield* case are now barred. Since the federal employees' Buck Act claim was the only allegation in the instant suit which was not raised and *could not have been* raised in the prior *Bedingfield* suit, the County contended that it was entitled to summary judgment on all the Plaintiffs' claims except the Buck Act claim of the federal employees.

The trial court entered an order granting summary judgment for the County on the state constitutional claims. The trial court specifically found that the state constitutional claims were "adjudicated" in *Bedingfield* and are now barred by *res judicata*. However, the trial court denied the County's summary judgment on the federal constitutional claims. The trial court specifically found that the federal constitutional claims were not barred by *res judicata* because those claims were not "adjudicated" in *Bedingfield*. [Trial court Order at R.414-415]

The trial court certified its interlocutory order which denied summary judgment on the federal constitutional claims as immediately appealable in accordance with Rule 5, Alabama Rules of Appellate Procedure. The Alabama Supreme Court permitted an immediate appeal.

On March 31, 1995, the Alabama Supreme Court released its decision in the instant case reversing the trial court and holding that the instant Plaintiffs are bound by the *Bedingfield* decision. The Alabama Supreme Court specifically found:

> The taxpayers in the *Bedingfield* action adequately represented the interests of the taxpayers here, and the respective taxpayers' interests are not only closely aligned – they are essentially identical. The "substantial identity of the parties" element of *res judicata* is met here.

IV. CORRECTION OF PETITIONERS' MISSTATEMENTS

1. Petitioners falsely stated that the federal constitutional claims in the instant case were not decided by the Alabama Supreme Court in the earlier *Bedingfield* case. In fact, every federal constitutional claim made by Petitioners in the instant case was pled, briefed, argued and rejected by the Alabama Supreme Court in *Bedingfield*.

2. Petitioners falsely described a simple division of a taxing authority between the state and the County as an "exemption scheme". In Act 406 the legislature acknowledged the existence of a state license code and that it applied only to certain identified businesses and occupations. In Act 406, the legislature merely authorized the

County to levy a tax only upon persons who were not already required by law to pay license or privilege tax to the state by reason of the state license code. [See § 3 and § 4, Act 406, contained in the appendix to this brief.] Further, Petitioners falsely state that this simple division of taxing authority between the state and the County could not have been directly challenged by the *Bedingfield* plaintiffs. Clearly, it could have been. However, the County submits that the seven attorneys representing the plaintiffs in *Bedingfield* recognized that it would have been a frivolous argument because the legislature has the clear legal right to divide the license privilege taxing authority between the state and the County and withhold from the County the authority to tax those businesses and occupations already subject to the state business occupational tax.

3. In an attempt to circumvent the jurisdictional considerations of Supreme Court Rule 10(c), Petitioners falsely stated that the decision of the Alabama Supreme Court in the instant case conflicts with applicable decisions of this Court. Specifically, Petitioners falsely stated that this Court's opinion in *Martin v. Wilkes*, 490 U.S. 755 (1989), stands for the proposition that, under no circumstances, can a non-party be bound by a judgment. In fact, at footnote 2 of the *Wilkes* opinion, this Court expressly recognized that a non-party may be bound by an earlier judgment where his interests were adequately represented by someone with the same interest who is a party. As demonstrated in this brief in opposition, Petitioners' interests are identical to the interests of the multiple *Bedingfield* plaintiffs and those interests were adequately

represented by the seven attorneys who challenged the County tax in *Bedingfield*.

SUMMARY OF THE ARGUMENT

In 1987 the Act and Ordinance at issue in the instant case were challenged in state court on the identical federal constitutional claims made by Petitioners in this case. The Act and the Ordinance were declared constitutional by the trial court and the Alabama Supreme Court in *Bedingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988).

In reliance on the Alabama Supreme Court's declaration that the Act and Ordinance were constitutional, the County, in 1989, pledged twenty annual payments of Ten Million Dollars of occupational tax proceeds to the Birmingham-Jefferson Civic Center Authority (BJCC) for repayment of certain bonds issued by BJCC for improvements to the Civic Center complex located in Birmingham, Alabama.

In 1992, Petitioners filed the instant suit seeking to relitigate the same federal constitutional challenges raised and rejected by the Alabama Supreme Court in the earlier *Bedingfield* case. The Alabama Supreme Court correctly held that the cause of action in both cases is substantially the same and that Petitioners are in privity with the earlier plaintiffs. The Alabama Supreme Court correctly held that Petitioners' interests in the instant case are identical to the interests of the earlier plaintiffs; and, that those interests were adequately represented by seven attorneys who challenged the Act and Ordinance on the same federal constitutional grounds in the earlier case.

The Alabama Supreme Court correctly determined that this suit is barred by *res judicata*.

Petitioners now attack the doctrine of *res judicata* itself. Petitioners urge this Court to establish a new definition of *res judicata* which would recklessly narrow the scope of the doctrine by deleting the concept of privity and substituting a requirement that only an actual party may be bound by a prior judgment. Petitioners also urge this Court to further narrow the scope of *res judicata* by holding for the first time that *res judicata* does not bar claims which could have been but were not actually litigated in an earlier case.

The County submits that Petitioners' arguments are frivolous and that, if adopted, their proposed new definition of *res judicata* would effectively eliminate the defense. As a result of such a decision, the constitutionality of a statute could never be settled. The declaratory judgments of the courts would be reduced to being non-binding and merely advisory in nature.

The County submits that the law of *res judicata* is so well established and so fundamental, that this case needs no review by this Court. The County urges this Court to decline review of this case.

ARGUMENT

RES JUDICATA LAW OF THIS COURT

This Court has held that, under the doctrine of *res judicata* a final judgment on the merits binds parties and

their *privies* on the same cause of action.[1] *Montana v. United States*, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979) (federal government in privity with individual contractor and therefor barred from relitigating constitutionality of state tax statute); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979) (Plaintiff in privity with federal Securities and Exchange Commission); *see generally United States v. Mendoza*, 464 U.S. 154, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984); *Nevada v. United States*, 463 U.S. 110, 103 S.Ct. 2906, 71 L.Ed.2d 509 (1983); *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980).

In *Allen v. McCurry, supra*, this Court also recognized that *res judicata* bars not only those claims which were actually litigated, but also bars all claims which *could have been* litigated in the prior suit. In *Nevada v. United States, supra*, this Court held:

> Simply put, the doctrine of *res judicata* provides that when a final judgment has been entered on the merits of a case "[i]t is a finality as to the claim or demand in controversy, concluding parties *and those in privity with them*, not only as to every matter which was offered and received to sustain or defeat the claim or demand, *but as to any other admissible matter which might have been offered for that purpose*. (citations omitted) (emphasis added).

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[1] This Court has explained that "[the doctrine of res judicata] serves to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *United States v. Mendoza*, 46 U.S. 154, 158 *citing Allen v. McCurry*, 449 U.S. at 94.

463 U.S. at 129, 130, *citing Cromwell v. County of Sac*, 94 U.S. 351, 352, 24 L.Ed. 195 (1876).

RES JUDICATA LAW OF ALABAMA

In a series of decisions the Alabama Supreme Court has implemented the doctrine of *res judicata* in a manner completely consistent with the foregoing decisions of this Court. The Alabama Supreme Court has held that the elements of the defense of *res judicata* are:

(1) A prior judgment on the merits;

(2) Rendered by a court of competent jurisdiction;

(3) Substantial identity of the parties (i.e. privity); and

(4) Substantially same cause of action.

Dairyland Insurance Company v. Jackson, 566 So.2d 723 (Ala. 1990); *Garris v. South Alabama Production Credit Association*, 537 So.2d 911 (Ala. 1989); *Wheeler v. First Alabama Bank*, 364 So.2d 1190 (Ala. 1978).

The Alabama Supreme Court has established the following test to determine whether "privity" exists:

> Privity is defined as a relationship between one who is party of record and a non-party that is sufficiently close so a judgment for or against the party should bind or protect the non-party. Privity exists where the non-party's interests were represented adequately by the party in the original suit. Privity also exists where a party to the original suit is so closely aligned to a non-party's interest as to be his virtual representative.

NAACP v. Hunt, 891 F.2d at 1560, citing, *United Merchants and Manufacturers v. Sanders*, 508 So.2d 689 (Ala. 1987); *Dairyland Insurance Company v. Jackson*, 566 So.2d 723 (Ala. 1990); *Whisman v. Alabama Power Co.*, 512 So.2d 78 (Ala. 1987).

Following *Allen v. McCurry, supra*, the Alabama Supreme Court has ruled that *res judicata* bars not only those claims actually litigated in an earlier case, but also bars all claims which *could have been* litigated. That is, *res judicata* is a defense not only to the precise legal theory presented in the prior case, *but to all legal theories and claims arising out of the same nucleus of operative fact. Dairyland Insurance Company v. Jackson, supra; Hughes v. Allenstein*, 514 So.2d 858 (Ala. 1987); *Whisman v. Alabama Power Co., supra; Dominick's, Inc. v. Key*, 456 So.2d 1047 (Ala. 1984); *Century 21 Preferred Properties, Inc. v. Alabama Real Estate Commission*, 401 So.2d 764 (Ala. 1981); *Adams v. Powell*, 225 Ala. 300, 142 So. 537 (1932).

The Alabama Supreme Court's test to determine whether two suits involve substantially the same cause of action is whether the same evidence would support a recovery in both suits. *Garris v. South Alabama Production Credit*, 537 So.2d 911 (Ala. 1989); *Dominick's, Inc. v. Key*, 456 So.2d 1047 (Ala. 1984); *Wheeler v. First Alabama Bank*, 364 So.2d 1190 (Ala. 1978). In *Garris*, the Alabama Supreme Court held:

> Regardless of the form of the action, the issue is the same when it is supported in both actions by substantially the same evidence. If it be so supported, a judgment in one action is conclusive upon the same issue in any suit, even if the cause of action is different.

537 So.2d at 914.

APPLICATION OF *RES JUDICATA* LAW TO THIS CASE

1. PRIOR JUDGMENT ON THE MERITS

As more fully described in the STATEMENT OF THE CASE this is the **second** federal constitutional challenge to the County tax. In, 1987 before the tax was implemented, the County was sued in state court by two separate groups of plaintiffs (i.e. the *Bedingfield* plaintiffs). The complaints of the *Bedingfield* plaintiffs contained the same federal constitutional challenges as in the instant suit. [*Bedingfield* complaints contained in the appendix to this Brief]. The cases were consolidated, tried and judgment was entered holding the Act and Ordinance constitutional. The case was appealed by the *Bedingfield* plaintiffs to the Alabama Supreme Court.

On appeal the state Supreme Court permitted amicus briefs from the Birmingham Area Chamber of Commerce, the Alabama AFL-CIO, the Laborers International Union of North America, Local 1317 and Shelby County, Alabama. All of the amicus briefs asserted federal equal protection challenges against the Act and Ordinance. [Amicus brief excerpts contained in the appendix to this Brief.]

On May 20, 1988, the Alabama Supreme Court released its opinion now published as *Bedingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988). The Alabama Supreme Court affirmed the trial court and held that Act 406 and Ordinance 1120 were constitutional. [*Bedingfield* opinion contained in the appendix to this brief.]

The prior judgment on the merits of Act 406 and Ordinance 1120 by the state trial court and the Alabama Supreme Court satisfies the first element of *res judicata*.

2. COURT OF COMPETENT JURISDICTION

It is axiomatic that the Alabama Supreme Court had jurisdiction over the *Bedingfield* case. Therefore, the second element of *res judicata* is satisfied.

3. SUBSTANTIAL IDENTITY OF THE PARTIES (PRIVITY)

Petitioners are raising the issue of privity for the first time before this Court. The trial court necessarily found the existence of privity between petitioners and the *Bedingfield* plaintiffs by holding that *some* of their claims were barred by *res judicata*. The trial court entered summary judgment in favor of the County on the petitioners' state constitutional claims expressly holding that those claims were barred by *res judicata*. For any claim to be barred by *res judicata* the trial court had to find the existence of privity. Petitioners made no issue of that holding with the trial court and did not cross-appeal that issue to the state Supreme Court. The County submits that petitioners have effectively waived the privity issue. Nevertheless the following is submitted to demonstrate that the trial court and the Alabama Supreme Court correctly determined that petitioners are in privity with their predecessors, the *Bedingfield* plaintiffs.

Application of the three elements of the Alabama test for privity to the facts of this case demonstrates that

Petitioners are in privity with the *Bedingfield* plaintiffs. If the *Bedingfield* plaintiffs had prevailed in the earlier case, the County tax would have been declared unconstitutional. The County would have been enjoined from collecting the tax. Petitioners would be protected from subsequent attempts by the County to collect the tax. The County would be bound by the earlier judgment invalidating the tax. Accordingly, the first element of the privity test is satisfied because the relationship between the *Bedingfield* plaintiffs and Petitioners is "sufficiently close so a judgment for or against the party should bind or protect the non-party".

The second element of the privity test requires that the interests between the party and non-party be "closely aligned". The "interests" of the *Bedingfield* plaintiffs and Petitioners are **identical**. Indeed, all of the taxpayers have identical legal interests under the federal constitution with respect to the County tax. The equal protection interest of Carolyn Phillips is no different from that of Jason Richards with respect to the County tax. Both sets of plaintiffs have the identical goal – to invalidate the tax. Both sets of plaintiffs made identical legal challenges to achieve that goal. With identical interests among petitioners and their predecessors in litigation, it is clear that the second test for privity is satisfied.

The third element of the privity test requires that the non-party's interests were adequately represented in the earlier case. Seven attorneys briefed and argued the plaintiffs' federal constitutional claims and other claims

to the Alabama Supreme Court.[2] Examination of the *Bedingfield* appellate brief excerpts [contained in the appendix to this Brief] reveals that *all of the claims in this case* (except the Buck Act claim) *were briefed, argued, considered and* ***REJECTED*** *by the Alabama Supreme Court*. Certainly, representation by seven attorneys is adequate to satisfy the third element of the privity test.

With the substantial identity between petitioners and the *Bedingfield* plaintiffs (i.e., privity) the third element of *res judicata* is satisfied.

4. SUBSTANTIALLY SAME CAUSE OF ACTION

As noted above, the Alabama test to determine whether two causes of action are substantially the same is whether the same evidence supports a recovery in both cases. The ultimate issue in this case and in *Bedingfield* are the same, that is, whether Act 406 and County Ordinance 1120 are constitutional. The evidence needed to prove a constitutional violation is the same today as it was when *Bedingfield* was decided. The evidence available to the instant Plaintiffs is identical to the evidence available to the *Bedingfield* plaintiffs. The Act has not been amended. The Ordinance has not been amended. The collection procedures of the County have not changed. The rate of taxation has not changed. Those subject to the tax have not changed. The claims of the Plaintiffs have not

[2] Seven attorneys filed briefs in opposition to the County tax. Those attorneys include Donald Watkins, Joe Whatley, David Sullivan, Samuel Fisher, Guy Tipton, William Tillery and Frank Ellis.

changed. The only change is the name of the plaintiffs' lawyers.

Because the evidence necessary to support both claims is identical, it is axiomatic that the fourth element of *res judicata* is satisfied. Both cases involve substantially the same cause of action.

Moreover, all of the claims raised by the instant Plaintiffs (except the Buck Act claim) were actually raised by the *Bedingfield* plaintiffs and were briefed and argued to the Alabama Supreme Court [*Bedingfield* appellate brief excerpts contained in the appendix to this Brief]. In fact, the *Bedingfield* brief squarely raised the equal protection issue as follows:

> II. If Act No. 406 were construed as authorizing an occupational tax, then:
>
> a. Is the act constitutional local legislation in light of the general laws governing the same subject?
>
> b. **Does the Act No. 406 comply with principles of equal protection?**

[Record at 272]

Closer examination of the text of the *Bedingfield* brief illustrates that the drafter chose to frame the equal protection issue by asserting that the population classification of Act 406 lacked a reasonable relationship with the statute's purpose (i.e., there was no rational basis for only large counties having an occupational tax). The Alabama Supreme Court responded to and rejected that argument beginning in the fifth paragraph on page 272 of Volume 527 of the Southern Reporter, Second Series. Alabama

Supreme Court Justice Sam Beatty devoted nearly a page and a half to the equal protection issue. In so doing, he relied upon *Peddycoart v. City of Birmingham*, 354 So.2d 808 (Ala. 1978), involving a similar equal protection challenge to a local law. The foregoing proves that an equal protection challenge to Act 406 and County Ordinance 1120 was raised by *Bedingfield*, was argued to the trial court, was briefed to the Alabama Supreme Court, was argued to the Alabama Supreme Court and was **REJECTED** by the Alabama Supreme Court.

Nevertheless, it really makes no difference whether the federal constitutional claims were previously adjudicated in *Bedingfield*. Clearly, they *could have been* adjudicated. That is all the law requires.

PETITIONERS HAVE HAD ALL THE PROCESS THEY ARE DUE

Due process entitles one to a remedy. It does not guarantee the outcome. It does not guarantee successive opportunities to relitigate the same subject matter until one finds the "right" judge. Petitioners' privies had the Act and Ordinance analyzed under the framework of the federal constitution by the highest court in Alabama in 1988. They were adequately represented by seven attorneys. They had their remedy and they lost. That is all the process they are due.

Petitioners now attack the doctrine of *res judicata* itself. They now claim due process effectively prohibits any court from ever finally deciding the constitutionality of a statute. Under the guise of due process, Petitioners urge this Court to recklessly narrow the scope of *res judicata* by eliminating the concept that one in privity with an earlier party is bound by the judgment on the merits in that case.[3] Also under the guise of due process petitioners urge this Court to further narrow the scope of *res judicata* by eliminating the concept that the doctrine bars claims which *could have been* but were not raised in the earlier case. That is, under the guise of "due process" petitioners urge this Court to adopt a new definition of *res judicata* which would effectively render meaningless the declarations of this Court and every other court in cases such as this which involve the constitutionality of a statute.

If this Court adopted Petitioners' definition of *res judicata* the constitutionality of a statute could never be settled. Declaratory judgments of the courts would mean nothing. They would be reduced to being merely advisory in nature. No one could rely on the judgment. Parties who lost could simply reword their claim and refile their suit. Non-parties could also relitigate even though they were in privity with the losing party. The due process right of the citizen would overcome and destroy the usefulness of the courts in deciding controversies.

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[3] Petitioners are, in effect, suggesting that class action status should be adopted as an element of *res judicata*. That would eliminate the concept of a non-party being bound by a judgment. Of course, the constitutionality of a statute could never be finally decided within this framework, at least not until every citizen who might some day be affected was identified and served with a summons and complaint. One wonders how the County would identify, locate and serve every possible future taxpayer.

This case is the classic example of the illogic of Petitioners' position. At present, there are an estimated 600,000 County taxpayers. According to Petitioners, privity does not exist, therefore, the only way to finally decide the constitutionality of the tax would be to identify, locate, serve and make all taxpayers and future taxpayers actual parties to this case (i.e., class action). Of course that was impossible in 1987. It is impossible today.[4]

When the *Bedingfield* suit was filed in 1987 the tax had not been implemented. There were no taxpayers. Because the tax was employer withheld there was no way for the County to identify every taxpayer. Therefore, according to Petitioners' reasoning, a class action in *Bedingfield* would have been ineffective to finally settle the constitutionality of the Act and Ordinance. Likewise, when the instant suit was filed in 1992 it was impossible for the County to identify, locate and serve every potential future taxpayer. Hundreds, perhaps thousands of new residents go to work in Jefferson County each year. According to petitioners, those new residents would not be bound by a judgment on the merits of this case! That is because they were not actual parties to this case. They would be free to litigate the same federal constitutional claims decided in this case and decided earlier in *Bedingfield*. Even with two class action victories the County

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[4] According to Petitioners' view of *res judicata* even the *Bedingfield* plaintiffs would not be bound by the earlier judgment. They could reword their equal protection challenge and file suit again, and again, and again until they find a judge who will invalidate the tax.

would never be able to rely on any court's declaration that the tax is constitutional.

THE COUNTY RELIED ON THE *BEDINGFIELD* DECISION

The consequence of adopting Petitioners' definition of *res judicata* would be a County government in a perpetual state of uncertainty about its revenue sources, unable to incur debt or contract for public improvements because there would be no certainty of payment. That consequence would frustrate this Court's stated purpose of *res judicata* in *Allen v. McCurry, supra,* where this Court held that one of the public policy reasons supporting the doctrine of *res judicata* was to encourage reliance on adjudication by preventing inconsistent decisions. 449 U.S. at 94.

The Alabama Supreme Court recognized and followed the spirit and the letter of *Allen v. McCurry* noting:

> The wisdom of disallowing successive attacks on the county tax on grounds that could have been pursued and adjudicated in the initial challenge is demonstrated by the BJCC's motion to intervene, which recites that it issued two series of bonds in 1989 to expand and improve the Civic Center. The motion continues:
>
> > "[P]ursuant to that certain Pledge and Appropriation Agreement between the Defendant Jefferson County and the Intervenor, said Defendant appropriated, pledged and agreed to pay a portion of the proceeds of the occupational tax at issue in this matter to the BJCC for repayment of the series 1989 and series 1989B Capital Outlay

> Special Tax Bonds issued by the BJCC in twenty (20) annual payments of $10,000,000.00 beginning in the year 1989 and ending in the year 2008.

In 1989, the county and the authority, in pledging the occupational tax revenue and issuing the bonds, could have relied on *Bedingfield* as authoritatively establishing that the county occupational tax was not unconstitutional for the reasons asserted by the *Bedingfield* plaintiffs. To allow a challenge now that was pleaded and could have been adjudicated in *Bedingfield* would not only violate the *res judicata* principles discussed above, but would also improperly interfere with the operations of the county and the BJCC and undermine the security of the bonds, to the detriment of the holders.

Jefferson County, et al. v. Jason Richards, et al., [opinion contained in appendix to this brief].

The County submits that it was entitled to rely and did rely on the *Bedingfield* decision which held Act 406 and Ordinance 1120 constitutional. To allow Petitioners to relitigate the identical claims that were decided in *Bedingfield* would subvert the very public policy reasons supporting *res judicata* which were identified by this Court in *Allen v. McCurry, supra.*

ACT 406 DOES NOT CREATE AN EXEMPTION SCHEME

Petitioners make the false statement that the *Bedingfield* plaintiffs could not have challenged the "exemptions" from the occupational tax. What Petitioners have falsely described as an "exemption scheme" is actually a

division of taxing authority between the state and the County.

In Act 406, the legislature acknowledged the existence of a state license code and that it applied only to certain identified businesses and occupations, and declared:

> Section 3. The purpose of this act [406] is to equalize the burden of taxation by authorizing the county to impose a license or privilege tax upon persons now engaging in certain businesses without paying any license tax thereon to either the state or the county.

The legislature then authorized the County to levy a tax only upon persons who were not already required by law to pay any license or privilege tax to either the state or the County by reason of the state license code:

> Section 4. The governing body of the county is hereby authorized to levy a license or privilege tax upon any person for engaging in any business for which he is not required by law to pay any license or privilege tax to either the State of Alabama or the county by any of the following: Article I, Chapter 20, Title 51; §§ 176, 177, 178, 180, 182, 183, 184, 186, 429 and 826, and Title 51 of the Code of Alabama of 1940, as amended.

This simple division of taxing authority between the state and the County could have been directly challenged by the *Bedingfield* plaintiffs. The County submits that the seven *Bedingfield* attorneys recognized that it was frivolous, and elected not to focus their case on a frivolous matter. The seven *Bedingfield* attorneys recognized that the state legislature has the clear right to divide the

license privilege taxing authority between the state and the County and withhold from the County the authority to tax those businesses and occupations already subject to the state business occupational tax.

CONCLUSION

Petitioners recklessly urge this Court to limit the doctrine of *res judicata* by holding that *res judicata* cannot bind a non-party. In effect, Petitioners urge this Court to eliminate the concept of privity. The County submits that such a narrow view of *res judicata* would result in the collapse of the judicial system. The constitutionality of a statute would never be finally settled. If there was ever a public policy reason to bind a non-party, it must surely be in a case such as this which involves the constitutionality of a tax statute. To hold otherwise would paralyze government.

The Alabama Supreme Court correctly applied the law of *res judicata* to the facts of this case. The Alabama Supreme Court correctly determined that the Petitioners' interests and constitutional claims relating to the County tax are identical to those of the *Bedingfield* plaintiffs and that those interests and claims were adequately represented by the seven *Bedingfield* attorneys. The Alabama Supreme Court correctly held that those claims were or could have been adjudicated in *Bedingfield* and are now barred by *res judicata*.

The County urges this Court to deny the petition for certiorari.

Respectfully submitted,

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APPENDIX

AN ACT

To authorize the governing body of any county of the State having a population of 500,000 or more, according to the last or any subsequent Federal census, to levy a business or privilege tax upon any business, vocation, occupation, calling or profession for which a license or privilege tax is not required for either the State of Alabama or the county by the laws of the State of Alabama, and to limit the amount of any such business or privilege tax.

Be It Enacted by the Legislature of Alabama:

Section 1. This Act shall apply to any county of the State of Alabama having a population of 500,000 or more, according to the last or any subsequent federal census, and to no other county.

Section 2. As used in this Act, the following words and terms shall have the meanings hereby ascribed to them; "the county" means a county subject to this Act; "the governing body" means the governing body of the county, whether it be a county commission, board of revenue or other governing body; "person" includes any natural person, corporation, firm, association or other entity; and "business" includes business, vocation, occupation, calling or profession; "license or privilege tax" shall not include any sales or use tax.

Section 3. The purpose of this Act is to equalize the burden of taxation by authorizing the county to impose a license or privilege tax upon persons now engaging in

certain businesses without paying any license tax thereon to either the state or county.

Section 4. The governing body of the county is hereby authorized to levy a license or privilege tax upon any person for engaging in any business for which he is not required by law to pay any license or privilege tax to either the State of Alabama or the county by any of the following Article 1, Chapter 20, Title 51; Sections 176, 177, 178, 180, 182, 183, 184, 186, 429, and 826 in Title 51 of the Code of Alabama of 1940 as amended.

When a person is engaged in more than one business for one or more of which a license or privilege tax is required to be paid to the State or the county but for one or more of which no license or privilege tax is required to be paid to the State or county, the county governing body shall have the authority to levy a license or privilege tax upon that business, or those businesses, for engaging in which such person is not required to pay any license or privilege tax to the State or county.

Section 5. The tax hereby levied shall be paid to that officer or employee of the county chargeable with the duty of collecting license or privilege taxes payable to the county.

Section 6. No license or privilege tax levied by the governing body of the county on any person, for engaging in any business shall be at a rate which is in excess of the rate of license or privilege tax levied by the largest municipality of the county on the same or similar type of business activity.

Section 7. It is hereby provided that all laws or parts of law in conflict with provisions of this Act are hereby repealed to the extent of such conflict.

Section 8. The provisions of this Act are severable; and should any part of this Act be declared unconstitutional or void, such declaration shall not affect the remaining provisions.

Section 9. This Act shall become effective upon its approval by the Governor or upon its otherwise becoming a law.

Approved September 7, 1967.

Time: 10:37 A.M.

ORDINANCE NO. 1120

An Ordinance to establish a license or privilege tax on persons engaged in any vocation, occupation, calling or profession in Jefferson County who is not required by law to pay any license or privilege tax to either the State of Alabama or the County as set out herein.

BE IT RESOLVED AND ORDAINED by the Jefferson County Commission as follows:

Section 1. DEFINITIONS. That the following words, when used in this Ordinance, shall have the meaning ascribed to them, except where the context clearly indicates or requires a different meaning:

(A) The word "person" shall mean any natural person. Whenever the word "person" is used in any clause prescribing and imposing a penalty in the nature of a fine or imprisonment, the work as applied to a partnership or other form of unincorporated enterprise shall mean the partners or members thereof, and as applied to corporations shall mean the officers and directors thereof.

(B) The words "vocation, occupation, calling and profession" shall mean and include the doing of any kind of work, the rendering of any kind of personal services, or the holding of any kind of position or job within Jefferson County, Alabama, by any clerk, laborer, tradesman, manager, official or other employee, including any non-resident of Jefferson County who is employed by any employer as defined in this section, where the relationship between the individual performing the services and the person for whom such services are rendered is, as

to those services, the legal relationship of employer and employee, including also a partner of a firm or an officer of a firm or corporation, if such partner or officer receives a salary for his personal services rendered in the business of such firm or corporation, but they shall not mean or include domestic servants employed in private homes and shall not include businesses, professions or occupations for which license fees are required to be paid under any General License Code of the County or to the State of Alabama or the County by any of the following: Chapter 12, Article 2, Title 40; §§ 40-21-50, 40-21-52, 53, 54 and 55; 40-21-57, 58, 59, and 60; 40-16-6; and 27-4-9 of the Code of Ala. 1975, as amended.

(C) The words "vocation, occupation, calling and profession" shall also mean and include the holding of any kind of office or position either by election or appointment, by any federal, state, county or city officer or employee where the services of such official or employee are rendered within Jefferson County, Alabama.

(D) The word "employee" shall mean and include any person engaging in or following any vocation, occupation, calling or profession within the meaning of subsection (B) of Section 1 of this Resolution and Ordinance.

(E) The word "employer" shall mean and include any person, business, firm, corporation, partnership, association or any other kind of organization who or that employs any person in any vocation, occupation, calling or profession in Jefferson County, Alabama,

within the meaning of subsection (B) of Section 1 of this Ordinance.

(F) The words "gross receipts" and "compensation" shall have the same meaning, and both words shall mean and include the total gross amount of all salaries, wages, commissions, bonuses or other money payment of any kind, or any other considerations having monetary value, which a person receives from or is entitled to receive from or be given credit for by his employer for any work done or personal services rendered in any vocation, occupation, calling or profession, including any kind of deductions before "take home" pay is received; but the words "gross receipts" and "compensation" shall not mean or include amounts paid to traveling salesmen or other workers as allowance or reimbursement for traveling or other expenses incurred in the business of the employer, except to the extent of the excess of such amounts over such expenses actually incurred and accounted for by the employee to the employer.

(G) The word "licensee" shall mean and include any person required to file a return or to pay a license fee under this ordinance.

(H) The word "county" shall mean Jefferson County, Alabama.

(I) The words "Director of Revenue" shall mean the Director of Revenue of Jefferson County, Alabama.

(J) The singular shall include the plural and vice versa, and the masculine shall include the feminine and the neuter.

Section 2. LICENSE FEES REQUIRED. It shall be unlawful for any person to engage in or follow any vocation, occupation, calling or profession as defined in Section 1 within the County on and after the 1st day of January, 1988, without paying license fees to the County for the privilege of engaging in or following such vocation, occupation, calling or profession, which license fees shall be measured by one-half percent (1/2%) of the gross receipts of each such person.

Section 3. WHERE WORK DONE OR SERVICES PERFORMED BOTH WITHIN AND WITHOUT THE COUNTY. In cases where compensation is earned as a result of work done or services performed both within and without the county, the license fees required under this Ordinance shall be computed by determining upon the oath of the employer, or if required by the Director of Revenue upon the oath of the employee, that percentage of the compensation earned from the proportion of the work which was done or performed within the County.

Section 4. EMPLOYERS TO WITHHOLD LICENSE FEES AND FILE RETURNS. Each employer shall deduct from each payment due each employee the amount of the license fees measured by one-half per centrum (1/2%) of the compensation due each employee beginning on the 1st day of January, 1988. The payments required to be made on account of such deductions by employers shall be made monthly to the County for the monthly periods ending January 31, February 28, March 31, April 30, May 31, June 30, July 31, August 31, September 30, October 31, November 30 and December 31st of each year, on or before the twentieth day of the month next following the end of each such monthly period, and

each employer shall at the same time make a return in connection therewith on a form made available to such employer by the Director of Revenue at the office of the Director of Revenue, provided that, if the total amount deducted from payments made to or due all employees of an employer is less than fifty ($50.00) dollars during each calendar month of the previous calendar year, then such employer may elect, for the current calendar year, to remit such deductions to the County for the quarterly periods ending March 31st, June 30th, September 30th and December 31st of such following calendar year, on or before the twentieth day of the month next following the end of each such quarterly period, and each such employer shall at the same time make a return in connection therewith on a form made available to such employer by the Director of Revenue at the office of Director of Revenue. Provided, however, that the failure or omission by any employer to deduct such license fees shall not relieve an employee from the payment of such license fees and compliance with the requirements for making returns as provided in this Ordinance, or with any regulations promulgated under this Ordinance. Each employer shall file in the office of the Director of Revenue on or before January 31, of each year a return on a form made available by said Director of Revenue, at the office of said Director of Revenue, which return shall show the gross amount of compensation of each employee, the amount of license fees deducted and paid by such employer for all or any part of the preceding calendar year and the last known address of each such employee. Each employer shall keep accurate records of all such compensation, deductions, license fees, payments and

returns. Such records shall be kept and maintained by each such employer for not less than five (5) years subsequent to the date such compensation was earned.

Section 5. RETURNS TO BE FILED BY EMPLOYEES. When a monthly or quarterly return, as required by Section 4 hereof is not filed by an employer and the license fees are not paid to the County by such employer monthly as herein provided, the employees for whom no return has been filed and no payment has been made shall file a return with the Director of Revenue on or before the 1st day of the second month next following the end of each such monthly or quarterly period, showing in said return his gross receipts subject to license fees for such month or quarter, and he shall also file a return with the Director of Revenue on or before January 31st of each year thereafter in which his employer has failed to file any monthly or quarterly return required in the preceding calendar year, showing on said return the gross receipts subject to license fees during the preceding calendar year. If for any reason all license fees of a person subject to the provisions of this Ordinance were not withheld by his employer from his gross receipts, such person shall file each return required by this Section on a form obtainable at the office of the Director of Revenue. In addition to the gross receipts earned by him, such return shall show such other pertinent information as may be required by the Director of Revenue. Each person making a return required by the Section shall, at the time of filing thereof, pay to the County the amount of license fees due under this Ordinance; provided, however, that any portion of the license fees deducted at the source shall be deducted on the return and only the balance, if any, shall

be due and payable at the time of filing said return. Each employee shall keep accurate records of all such compensation, deductions, license fees, payments and returns. Such records shall be kept and maintained by each such employee for not less than five (5) years subsequent to the date such compensation was earned.

Section 6. DUTIES OF THE DIRECTOR OF REVENUE. It shall be the duty of the Director of Revenue to collect and receive all license fees imposed by this Ordinance and to keep records showing the amounts received by him from each employer. All moneys received by the Director of Revenue shall be deposited in a duly approved depository.

Section 7. INVESTIGATIVE POWERS OF THE DIRECTOR OF REVENUE. The Director of Revenue or any agent or employee designated by him is hereby authorized to examine the books, papers and records of any employer or supposed employer, or of any licensee or supposed licensee, in order to determine the accuracy of any return made, or if no return was made to ascertain the amount of license fees due under the terms of this Ordinance by such examination. Each Such employer or supposed employer or licensee or supposed licensee shall give to the Director of Revenue, or to his duly authorized agent or employee, the means, facilities and opportunity for the making of such examination and investigation. The Director of Revenue is hereby authorized to examine any person under oath concerning any gross receipts which were or should have been shown in a return, and to this end he may compel the production of books, papers, records and the attendance of all persons before him, whether as parties or as witnesses, whom he

believes to have knowledge of such gross receipts or compensation.

Section 8. REGULATIONS MAY BE PROMULGATED. The Director of Revenue may prescribe, adopt, promulgate and enforce reasonable rules and regulations not in conflict with this Ordinance relating to any matter or thing pertaining to the administration and enforcement of the provisions of this Ordinance, including but not limited to provisions for the re-examination and correction of returns as to which overpayment or underpayment is claimed or found to have been made, and the regulations so promulgated shall be binding upon all licensees and employers.

Section 9. INFORMATION TO BE CONFIDENTIAL. Notwithstanding any resolutions and ordinances to the contrary, any information gained by the Director of Revenue or any other official or agent or employee of the County as a result of any returns, investigations, hearings, or verifications required or authorized by this Ordinance shall be confidential, except for official purposes, or in accordance with proper judicial order, or the enforcement of this Ordinance, and any person or agent divulging such information, except as herein permitted, shall upon conviction be subject to a fine of not more than One Hundred Dollars ($100.00) or to imprisonment of not exceeding thirty (30) days, or to both such fine and imprisonment.

Section 10. INTEREST AND PENALTIES.

(A) All license fees imposed by this Ordinance which are delinquent, that is, which remain unpaid after

they become due shall, subject to the provisions hereinafter set out, bear interest at the rate of twelve percentum (12%) per annum, and any person who has failed to pay such license fees when the same became due shall, subject to the provisions hereinafter set out, also be charged a penalty of ten percentum (10%) of the amount of such unpaid license fees. Any person or employer who fails or refuses to withhold any license fees payable under this Ordinance, or who fails to pay such fees after withholding the same to the County at the time it is due, as provided under the provisions of Section 4 hereof, shall become liable to the County for such fees, as well as for the interest thereon at the rate of twelve percentum (12%) per annum, and for the aforesaid penalty. Provided, however, that the minimum penalty imposed against such person or employer shall be Three Dollars ($3.00). Provided the Director of Revenue, if a good and sufficient reason is shown for the failure to pay the tax within the time required, may waive or remit the penalty and interest, or a portion of either, upon payment of the tax due.

(B) Any person or employee who shall fail, neglect or refuse to pay a license fee as by this Ordinance required, or any employer who shall fail to withhold said license fees, or to pay over to County such license fees, penalties or interest imposed by this Ordinance, or any person required to file a return under the provisions of Section 5 of this Ordinance, who shall fail, neglect or refuse to file such return, or any person or employer who shall refuse to permit the Director of Revenue or any agent or employee designated by him, in writing, to examine his books, records and papers for any purpose authorized by this Ordinance, or who shall knowingly

make any incomplete, false or fraudulent return, or who shall attempt to do anything whatever to avoid the full disclosure of the amount of gross receipts or compensation in order to avoid the payment of the whole or any part of a license fee, shall upon conviction be subject to punishment within the limits of and as provided by law for each offense. Such punishment shall be in addition to the penalties imposed under subsection (A) of this section.

Section 11. EXTENSION OF TIME FOR MAKING RETURN. The Director of Revenue, for good cause, may extend the time for making any return required under the provisions of this Ordinance, but the time for filing any such return shall not be extended for a greater period then thirty (30) days from the day such return is due to be made and shall not prevent penalty and interest from accruing during the period of such extension.

Section 12. USE OF LICENSE FEES. All money derived from license fees under the provisions of this Ordinance shall be paid to the General Fund of the County and expended as authorized by law.

Section 13. SEVERABILITY. The provisions of this Ordinance are severable. If any provisions, section, paragraph, sentence or part thereof, or the application thereof to any employer or licensee or class or persons, shall be held unconstitutional or invalid, such decision shall not affect or impair the remainder of the Ordinance, it being the legislative intent to ordain and enact each provision, section, paragraph, sentence and part thereof, separately and independently of each other.

Section 14. REPEAL OF RESOLUTION AND ORDINANCES. All resolutions and ordinances or parts of resolutions and ordinances in conflict with this Ordinance are to the extent of such conflict hereby repealed.

Section 15. EFFECTIVE DATE. This Ordinance shall be in full force and effect on and after January 1, 1988, and from year to year thereafter, until repealed.

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
IN EQUITY

HOYT BEDINGFIELD, JR., individually and in his capacity as Acting Director of Finance of the City of Birmingham, and THE CITY OF BIRMINGHAM,	)	
Plaintiffs,	)	CIVIL ACTION NO.
v.	)	
JEFFERSON COUNTY, ALABAMA, REUBEN DAVIS, JIM GUNTER JOHN KATOPODIS, CHRIS McNAIR, and DAVID ORANGE in their official capacities as Commissioners of Jefferson County,	)	
Defendants.	)	

VERIFIED COMPLAINT

1. This is a complaint for a declaratory judgment and other equitable relief.

2. This action is brought pursuant to the Alabama Declaratory Judgments Act, *Ala. Code* § 6-6-220 *et seq.* (1975), and Rules 57 and 65, Alabama Rules of Civil Procedure, for a declaratory judgment that Ordinance No. 1120 adopted by the Jefferson County Commission is void or invalid, and if necessary, that Act No. 406 passed by the Alabama Legislature in 1967 and approved by the Governor on September 7, 1967, is void and invalid to the extent that it supports any comprehensive occupational tax on all persons working in Jefferson County. *Ala. Code* § 6-6-223 specifically authorizes the declaratory judgment

with respect to such statutes and ordinances. Plaintiffs allege that there is presently uncertainty and insecurity as to the rights and legal relations of the parties, as to the matters at issue in this action, and that a declaratory judgment is needed to determine those rights and legal relations.

3. Venue is proper in this Court.

4. Attached hereto as Appendix "A" is Ordinance No. 1120 adopted by the Jefferson County Commission on or about the 29th day of September, 1987 to be effective January 1, 1988. Said ordinance purports to establish a licensed or privileged tax on persons engaged in any vocation, occupation, calling or profession in Jefferson County who is not required by law to pay any licensed or privileged tax to either the State of Alabama or the County.

5. It is the well established law in Alabama that county governments lack the authority to impose taxes unless specifically authorized by the Legislature.

6. The defendants or some of them have publicly contended that Ordinance No. 1120 is authorized by Act 406 adopted by the Alabama Legislature in 1967 and approved by the Governor on September 7, 1967. A copy of that Act is attached as Appendix "B".

7. During the 1987 regular session of the Alabama Legislature, the defendants recognized that they did not have authority to enact a comprehensive occupational tax like the one purported to be adopted in Ordinance No. 1120, and the defendants, or most of them, had proposed

in the Alabama Legislature House Bill No. 941, purporting to give them the authority to adopt an occupational tax. A copy of that bill is attached as Appendix "C". It failed to pass the Alabama Legislature.

8. If put into effect, Ordinance No. 1120 would have a dramatic effect upon the plaintiffs. First with respect to plaintiff Bedingfield individually, the occupational tax would be taken from his salary. Second, plaintiff Bedingfield, as acting Director of Finance of the City of Birmingham, needs an immediate declaration as to whether Ordinance No. 1120 is valid or constitutional. Plaintiff Bedingfield must take steps immediately to implement a system to withhold taxes from employees of the City under Ordinance No. 1140. If said Ordinance is not valid, then it would be improper for him to withhold the tax from the many employees of the City. Third, and more importantly, the occupational tax would exacerbate the problems faced by the City of Birmingham, and its residents, in attracting and maintaining jobs, especially in light of the strong competition faced by it from areas such as north Shelby County in attempting to recruit jobs, especially higher paying jobs, from the City of Birmingham and into the suburban area of north Shelby County. The effect of Ordinance 1120 would be not only taking jobs from the City of Birmingham but also to erode the tax base and to otherwise harm the City and the residents of the City of Birmingham.

9. Plaintiffs need an immediate determination and a preliminary injunction against the enforcement of Ordinance No. 1120. Without such a determination and preliminary injunction, plaintiffs would suffer irreparable

harm. First, plaintiff Bedingfield and the City of Birmingham will have to incur the cost of establishing and implementing a system to withhold taxes from employees of the City. If the Ordinance No. 1120 is illegal or unconstitutional, then plaintiff Bedingfield and the City of Birmingham would be acting improperly in withholding taxes from employees of the City, and may face claims against them for doing so. If he refuses to withhold, then he faces possible criminal prosecution under § 10 of Ordinance No. 1120.

10. Plaintiffs offer to do equity.

CLAIM ONE

10. Paragraphs 1 through 9 are hereby realleged and incorporated herein.

11. Under Art. IV § 44 and Art. XI § 212 of the Constitution of Alabama of 1901, Ordinance No. 1120 is an unconstitutional effort by the Jefferson County Commission to impose a tax upon the citizens of Jefferson County and those working in Jefferson County.

CLAIM TWO

12. Paragraphs 1 through 11 are hereby realleged and incorporated herein.

13. Ordinance No. 1120 is not authorized by Act 406 and is therefore an unauthorized attempt by the Jefferson County Commission to impose a tax upon the citizens of Jefferson County and those working in Jefferson County.

CLAIM THREE

14. Paragraphs 1 through 13 are hereby realleged and incorporated herein.

15. If Ordinance No. 1120 were authorized by Act 406, then Act 406 is unconstitutional based upon any one of the following grounds:

A. Act 406 is unconstitutional local legislation under Article IV, §§ 104(15) and 105 of the Constitution of Alabama of 1901.

B. Act 406 is a violation of the equal protection and provisions of the federal and state constitution.

C. If Act No. 406 were construed to give the defendants the authority to adopt Ordinance No. 1120, then Act 406 is unconstitutional under Article IV, § 45 of the Constitution of Alabama of 1901 because the title of the bill is not sufficiently descriptive to support a comprehensive occupational tax and the title is not consistent with the content of the Act.

D. If Act No. 406 were construed to give the defendants the authority to adopt Ordinance No. 1120, then Act No. 106 is unconstitutional under Article IV, §§ 45 and 71 of the Constitution of Alabama of 1901 in that the law contains more than one subject.

E. Act No. 406 is vague and ambiguous and therefore is a violation of the due process requirements of the state and federal constitution.

WHEREFORE, plaintiffs demand judgment against defendants and request this Court:

A. To declare that Ordinance No. 1120 is void, invalid, and unconstitutional and to issue preliminary and final injunctive relief prohibiting the enforcement of said ordinance;

B. To the extent necessary to declare that Act 406 is invalid, void, and unconstitutional and to issue appropriate injunctive relief prohibiting its enforcement;

C. To issue such other and further relief as may be appropriate and necessary under the circumstances.

Respectfully submitted,

/s/ Donald V. Watkins
Donald V. Watkins

WATKINS, CARTER & KNIGHT
Suite 214
500 South 22nd Street
Birmingham, Alabama 35233
205/323-5963

/s/ David A. Sullivan
David A. Sullivan

Suite 214
500 So. 22nd Street
Birmingham, Alabama 35233
205/324-4600

Sam Fisher

City of Birmingham
Law Department
600 City Hall
Birmingham, Alabama 35203
205/254-2369

VERIFICATION

Upon being duly sworn, I, Hoyt Bedingfield, hereby affirm that I have read the foregoing Verified Complaint and it is true and correct to the best of my knowledge, information and belief.

Hoyt Bedingfield

Sworn to and subscribed before me this 19th day of October, 1987.

Notary Public

IN THE CIRCUIT COURT
FOR
JEFFERSON COUNTY, ALABAMA

CAROLYN PHILLIPS, JOHN ROGERS DALE PATTON	)	
PLAINTIFFS,	)	CASE NO. CV87 504-469 JDC
VS.	)	
THE JEFFERSON COUNTY COMMISSION	)	
DEFENDANT.	)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is a suit for declaratory and injunctive relief against the action of the Jefferson County Commission levying an occupational tax on employees of Jefferson County.

PARTIES

2. Plaintiffs Carolyn Phillips John Rogers, Dale Patton are over the ages of nineteen (19) years, employees within Jefferson County, and reside in Jefferson County Alabama.

3. Plaintiffs bring this action in their individual capacity.

4. Defendant, the Jefferson County Commission is the County's governing body established pursuant to Federal Decree of 1985 in the case of Taylor, et al. v.

Jefferson County Commission and otherwise governed by the general laws of Alabama.

FACTUAL ALLEGATIONS

5. On September 29, 1987, Defendant adopted a resolution levying a county-wide occupational tax to take effect January 1, 1988.

6. Defendant followed Act No. 406 of 1967 State of Alabama as authority to impose said occupational tax.

7. Act No. 406 of 1967 authorizes the governing body of any county of the State having a population of 500,000 or more, according to the last or and subsequent Federal Census, to levy a business or privilege tax upon any business, vocation, occupation, calling or profession for which a license or privilege tax is not required for either the State of Alabama or the county by the laws of the State of Alabama, and to limit the amount of any such business or privilege tax.

8. Act No. 406 of 1967, State of Alabama, was enacted as a general law.

9. Section 110 of the Constitution says: "A general law within the meaning of this Article is a law which applies to the whole state; a local law is a law which applies to any political subdivision or subdivisions of the State less than the whole; a special or private law within the meaning of this Article is one which applies to an individual, association, or corporation."

10. Plaintiff avers that Act No. 406 of 1967 is not a general law because of its arbitrary classification. For Act No. 406 to be a "general" law, it must have application to

a shifting class; there must be a possibility of application to other counties within the classification fixed by the statue [sic]. Act No. 406 of 1967 applies ostensibly to Jefferson County and does not apply to any other county in the State of Alabama.

11. Section 106 of the Constitution provides that no local, special, or private law shall be passed on any subject without giving the notice as there prescribed, and makes it the mandatory duty of the Courts to declare the same void if the journals do not affirmatively show that it was passed in accordance with the Section.

12. Act No. 406 of 1967, although passed as a general law under Section 110 of the Constitution, is a local law and is due to be held void on the basis that the journals do not reflect that there was notice of said Act as required by Section 106 of the Constitution of Alabama.

13. Plaintiffs aver that Act No. 406 of 1967 is constitutionally offensive because the classification restriction to counties with a population of 500,000 or more residents does not bear a reasonable relationship to the purpose of the law. Such classification is arbitrary and results in a violation of the Constitution of Alabama and of the United States. There is no logical relationship between the population contained in said Act and the purpose as set out in Section One of said Act.

14. Plaintiffs aver that Act No. 406 of 1967 should be declared void for vagueness, inasmuch as its language appears to tax certain persons and not tax others. Equally, said Act contains a reference to establishing as a benchmark the rate of license or privilege tax levied by the largest municipality in the county.

15. Plaintiffs aver that reference to said Act No. 406 of 1967 authorizing the county to levy a business or license fee on those businesses that are not licensed by the county or State shows an intention by the Legislature to avoid other taxes such as the occupational tax the Defendant has adopted to take effect January 1, 1988.

16. Plaintiffs allege that the Defendant is due to be enjoined from levying an occupational tax because said tax, effective January 1, 1988, will subject their wages to confiscation without due process of law.

17. Plaintiffs allege that Act No. 406 of 1967 adopted by the Defendant constitutes a denial of equal protection in violation of the Fourteenth Amendment of the United States Constitution. Said Act exempts professional occupations required by State law to be licensed but does not exempt other professional and nonprofessional occupations.

18. Plaintiff [sic] request an expedited hearing of this matter.

WHEREFORE, for the above reasons Plaintiffs pray that this Court will assume jurisdiction and enter a judgment as follows:

1. Enter an Order finding that Act No. 406 of 1967 was not intended to authorize Defendant to levy any tax other than on businesses that, on its effective date, did not pay a license or privilege tax to the state or county and permanently enjoin Defendant from levying an occupational tax on Plaintiffs.

2. Enter an Order finding that Act No. 406 of 1967 is void on its face by not comporting to the requirements of

Section 106 of the Alabama Constitution which requires that the journal of both House and Legislature contain a showing of notice and proof of advertising.

3. Enter an Order finding that the population classification contained in Act No. 406 of 1967 does not bear a reasonable relationship to the purpose of said Act and is therefore a local law void on its face in violation of Section 106 of the Alabama Constitution.

4. Enter an Order finding that Act No. 406 of 1967 violates the due process clause of the Constitution of the United States by denying Plaintiffs their right to equal protection.

5. Enter an Order finding that Act No. 406 of 1967 is void for vagueness and is unconstitutional on its face.

6. Enter an Order granting such other relief as the Court may deem proper.

7. Enter an Order taxing cost against Defendant.

Respectfully submitted;

/s/ Ronald L. Spratt
RONALD L. SPRATT
Attorney for Plaintiffs
1400 Bank for Savings Building
Birmingham, AL 35203-4007
(205) 251-7180

IN THE CIRCUIT COURT
FOR
JEFFERSON COUNTY ALABAMA

CAROLYN PHILLIPS, JOHN ROGERS DALE PATTON	)	
PLAINTIFFS,	)	CASE NO. CV 87 504-469 JDC
VS.	)	
THE JEFFERSON COUNTY COMMISSION	)	
DEFENDANT.	)	

AMENDED AND VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

(Filed Nov. 4, 1987)

1. This is a suit for declaratory and injunctive relief against the action of the Jefferson County Commission levying an occupational tax on employees of Jefferson County.

PARTIES

2. Plaintiffs Carolyn Phillips, John Rogers, Dale Patton are over the ages of nineteen (19) years, employees within Jefferson County, and reside in Jefferson County Alabama.

3. Plaintiffs bring this action in their individual capacity.

4. Defendant, the Jefferson County Commission is the County's governing body established pursuant to Federal Decree of 1985 in the case of Taylor, et al. v.

Jefferson County Commission and otherwise governed by the general laws of Alabama.

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5. On September 29, 1987, Defendant adopted a resolution levying a county-wide occupational tax to take effect January 1, 1988.

6. Defendant followed Act No. 406 of 1967 State of Alabama as authority to impose said occupational tax.

7. Act No. 406 of 1967 authorizes the governing body of any county of the State having a population of 500,000 or more, according to the last or and subsequent Federal Census, to levy a business or privilege tax upon any business, vocation, occupation, calling or profession for which a license or privilege tax is not required for either the State of Alabama or the county by the laws of the State of Alabama, and to limit the amount of any such business or privilege tax.

8. Act No. 406 of 1967, State of Alabama, was enacted as a general law.

9. Section 110 of the Constitution says: "A general law within the meaning of this Article is a law which applies to the whole state; a local law is a law which applies to any political subdivision or subdivisions of the State less than the whole; a special or private law within the meaning of this Article is one which applies to an individual, association, or corporation."

10. Plaintiffs aver that Act No. 406 of 1967 iS not a general law because or its arbitrary classification. For Act No. 406 to be a "general" law, it must have application to

a shifting class; there must be a possibility of application to other counties within the classification fixed by the statue [sic]. Act No. 406 of 1967 applies ostensibly to Jefferson County and does not apply to any other county in the State of Alabama.

11. Section 106 of the Constitution provides that no local, special, or private law shall be passed on any subject without giving the notice as there prescribed, and makes it the mandatory duty of the Courts to declare the same void if the journals do not affirmatively show that it was passed in accordance with the Section.

12. Act No. 406 of 1967, although passed as a general law under Section 110 of the Constitution, is a local law and is due to be held void on the basis that the journals do not reflect that there was notice of said Act as required by Section 106 of the Constitution of Alabama.

13. Plaintiff avers that Act No. 406 of 1967 is constitutionally offensive because the classification restriction to counties with a population of 500,000 or more residents does not bear a reasonable relationship to the purpose of the law. Such classification is arbitrary and results in a violation of the Constitution of Alabama and of the United States. There is no logical relationship between the population contained in said Act and the purpose as set out in Section One of said Act.

14. Plaintiffs aver that Act No. 406 of 1967 should be declared void for vagueness, inasmuch as its language appears to tax certain persons and not tax others. Equally, said Act contains a reference to establishing as a benchmark the rate of license or privilege tax levied by the largest municipality in the county.

15. Plaintiffs aver that reference to said Act No. 406 of 1967 authorizing the county to levy a business or license fee on those businesses that are not licensed by the county or State shows an intention by the Legislature to avoid other taxes such as the occupational tax the Defendant has adopted to take effect January 1, 1988.

16. Plaintiffs allege that the Defendant is due to be enjoined from levying an occupational tax because said tax, effective January 1, 1988, will subject their wages to confiscation without due process of law as required by the Constitution of Alabama and of the United States.

17. Plaintiffs allege that Act No. 406 of 1967 adopted by the Defendant constitutes a denial of equal protection in violation of the Fourteenth Amendment of the United States Constitution. Said Act exempts professional occupations required by State law to be licensed but does not exempt other professional and nonprofessional occupations.

18. Plaintiffs request an expedited hearing of this matter.

19. Plaintiffs allege that they are entitled to Attorney fees under 42 U.S.C. 1988 with respect to civil rights claims.

WHEREFORE, for the above reasons Plaintiffs pray that this Court will assume jurisdiction and enter a judgment as follows:

1. That this Court award a reasonable Attorney fee to Plaintiffs' lawyers as prevailing parties pursuant to 42 U.S.C. 1988.

2. Enter an Order finding that Act No. 406 of 1967 was not intended to authorize Defendant to levy any tax other than on "businesses" that, on its effective date, did not pay license or privilege tax to the state or county and permanently enjoin Defendant from levying an occupational tax on Plaintiffs.

3. Enter an Order finding that Act No. 406 of 1967 is void on its face by not comporting to the requirements of Section 106 of the Alabama Constitution which requires that the journal of both House and Legislature contain a showing of notice and proof of advertising.

4. Enter an Order finding that the population classification contained in Act No. 406 of 1967 does not bear a reasonable relationship to the purpose of said Act and it therefore a local law void on its face in violation of Section 106 of the Alabama Constitution.

5. Enter an Order finding that Act No. 406 of 1967 violates the due process clause of the Constitution of the United States by denying Plaintiffs their right to equal protection.

6. Enter an Order finding that Act No. 406 of 1967 is void for vagueness and is unconstitutional on its face.

7. Enter an Order granting such other relief as the Court may deem proper.

8. Enter an Order taxing cost against Defendant.

Respectfully submitted;

/s/ Ronald L. Spratt
RONALD L. SPRATT
Attorney for Plaintiffs
1400 Bank for Savings Building
Birmingham AL 35203-4007
(205) 251-7180

VERIFICATIONS

Upon being duly sworn, I, Carolyn Phillips, hereby affirm that I have read the foregoing Amended and verified Complaint for Declaratory and Injunctive Relief and it is true and correct to the best of my knowledge, information and belief.

/s/ Carolyn Phillips
Carolyn Phillips

Sworn to and subscribed before me this 4th day of November, 1987.

/s/ Nadine B. Porter
NOTARY PUBLIC

Upon being duly sworn, I, John Rogers, hereby affirm that I have read the foregoing Amended and verified Complaint for Declaratory and Injunctive Relief and it is true and correct to the best of my knowledge, information and belief.

/s/ John W. Rogers, Jr.
John Rogers

Upon being duly sworn, I, Dale Patton, hereby affirm that I have read the foregoing Amended and verified Complaint for Declaratory and Injunctive Relief and it is true and correct to the best of my knowledge, information and relief.

/s/ Dale Patton
Dale Patton

Sworn to and subscribed before me this 4th day of November, 1987.

/s/ Nadine B. Porter
Notary Public

PLAINTIFFS DEMAND A TRIAL BY STRUCK JURY

/s/ RONALD L. SPRATT
RONALD L. SPRATT

IN THE SUPREME COURT OF ALABAMA

No.

HOYT BEDINGFIELD, JR., et al.,

Plaintiffs-Appellants

v.

JEFFERSON COUNTY, ALABAMA, et al.,

Defendants-Appellees.

CAROLYN PHILLIPS, et al.,

Plaintiffs-Appellants,

v.

THE JEFFERSON COUNTY COMMISSION,

Defendants-Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA IN EQUITY

BRIEF ON BEHALF OF PLAINTIFFS-APPELLANTS, HOYT BEDINGFIELD, JR. AND THE CITY OF BIRMINGHAM

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Samuel Fisher
City of Birmingham
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205/254-2369

ORAL ARGUMENT REQUESTED

• • •

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Did the Legislature Intend for Act No. 406 to Authorize Jefferson County to Levy an Occupational Tax?

II. If Act No. 406 Were Construed as Authorizing an Occupational Tax, Then:

A. Is the Act Constitutional Local Legislation in Light of the General Laws Governing the Same Subject?

B. Does the Act No. 406 and the Occupational Tax Adopted by Jefferson County Comply with Principles of Equal Protection?

IV. Even if the County Had the Authority to Levy an Occupational Tax, Does it Have the Authority to Collect the Tax?

* * *

East Brewton Materials, Inc. v. State Department of Revenue, 45 Ala. App. 584, 588, 233 So.2d 751 (Ala. Civ. App. 1970).

II. IF ACT NO. 406 WERE CONSTRUED AS AUTHORIZING ORDINANCE NO. 1120, THEN THE ACT WOULD BE UNCONSTITUTIONAL.

If Act No. 406 were construed broadly enough to authorize an occupational tax, then the Act would be unconstitutional. First, it would violate the limitation on local legislation announced in *Peddycoart v. City of Birmingham*, 354 So.2d 808, 813 (Ala. 1978), which should be applied to this attempt to broaden the intent of Act No. 406. Second, even if Act No. 406 were considered to be proper local legislation, it would violate well established principles of equal protection.

A. The Attempt to Expand the Authority of Act No. 406 to Levy an Occupational Tax Violates the Limitation on Local Legislation.

The County cannot rely upon local legislation to establish an occupational tax. First, this Court's analysis of *Peddycoart v. City of Birmingham*, 354 So.2d 808 (Ala. 1978) should be applied to the County's attempt in 1987 to expand the intent of local legislation to establish an occupational tax. Second, even if this analysis were not applied, the general laws of Alabama have preempted the field of license and privilege taxation to prevent reliance on local legislation.

* * *

B. The Occupational Tax, as Adopted, and Act No. 406 Violate Well Established Principles of Equal Protection.

In the area of statutory grants of authority to municipalities or counties based upon population classifications, there must exist a reasonable relationship between the statute's purpose and the population classification established. If not, the classification will be deemed arbitrary and the statute must fail under Equal Protection scrutiny. *Dearborn v. Johnson*, 234 Ala. 84, 173 So. 864 (1937); *Peddycoart v. City of Birmingham*, 354 So.2d 808 (Ala. 1978).

In the case here, one does not have to surmise about the possible purpose of Act 406; the *purpose* of the act is quite clearly and simply set out in Section 3 of the act, *viz:*

> "Section 3. The *purpose* of this Act is to *equalize the burden of taxation* by authorizing the county to impose a license or privilege tax *upon persons now engaging in certain businesses without paying any license tax thereon* to either the state or county." (Emphasis inserted)

1967 Ala. Acts 406.

Section 4. goes on to identify those "certain businesses":

> "Section 4. The governing body of the county is hereby authorized to levy a license or privilege tax upon any person for engaging in any business for which he is not required by law to pay any license or privilege tax to either the State of Alabama or the county *by any of the*

following: Article 1, Chapter 20, Title 51; Sections 176, 177, 178, 180, 182, 183, 184, 186, 429, and 826 in Title 51 of the Code of Alabama of 1940 as amended." (Emphasis inserted)

1967 Ala. Acts 406.

The obvious purpose of the Act was to reach those businesses that were enjoying a "free ride" by operating within Jefferson County with no obligation to pay business license fees. Under the Act, those businesses could be required to assume tax responsibility comparable to other businesses falling subject to license taxation under the "general laws" set forth within Section 4.

The critical determination for this Court is whether the population classification recited in the statute, (i.e., 500,000 or more) bears any relationship to the statute's purpose, and then further, whether that relationship is a reasonable one. *Peddycoart*, supra.

Unmistakably, the statute's emphasis and direction is focused upon *then-unlicensed businesses*. There is no indication that any need for revenue by Jefferson County supplied any part of the legislative motivation.

The analysis, then, for application of Equal Protection scrutiny, should focus on whether there is a reasonable relationship between taxing previously unlicensed businesses and counties with populations numbering 500,000 or more. We say there is not. There is no articulable distinction, except *bare location* of operation, between unlicensed businesses operating in Jefferson County and those operating in any of the other 66 counties within the state.

• • •

IN THE CIRCUIT COURT
TENTH JUDICIAL CIRCUIT OF ALABAMA

HOYT BEDINGFIELD, JR., et al.,	)	
Plaintiffs,	)	CASE NO.
v.	)	87-504-465 JDC
JEFFERSON COUNTY, ALABAMA, et al.,	)	
Defendants.	)	
CAROLYN PHILLIPS, et al.,	)	
Plaintiffs,	)	
v.	)	CASE NO.
THE JEFFERSON COUNTY COMMISSION,	)	CV 87 504-469 JDC
Defendants.	)	

MEMORANDUM BRIEF ON BEHALF OF DEFENDANTS
JEFFERSON COUNTY, ALABAMA, AND
THE JEFFERSON COUNTY COMMISSION

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• • •

SECTION VII. EQUAL PROTECTION

Plaintiffs assert that Act No. 406 violates the equal protection provision of the U. S. Constitution. The test for an equal protection violation is set out in *Jefferson County v. Braswell*, 407 So.2d 115 (1981). The *Braswell* court reviewed a local law setting out special requirements on beer distribution in Jefferson County. The court upheld the law against a § 105, Constitution challenge, a commerce clause challenge, and a due process and equal protection clause challenge. With respect to equal protection the court set forth the following test:

> Any form of state legislation creating discriminating classifications (1) that concern *fundamental constitutional rights*, or (2) whose defining criteria are *inherently suspect*, or (3) that are *unnecessarily restrictive and unreasonably related* to the legislation's purported purpose, is subject to challenge and examination as a denial of equal protection of the law. *Craig v. Boren*, 492 U.S. 90, 97 S.Ct. 451, 50 L.Ed.2d 397 (1977). (Emphasis added.)

The *Peddycoart, supra*, case and the later case of *Crandall v. City of Birmingham*, 442 So.2d 77 (1983), are particularly instructive regarding the court's application of the foregoing test. In *Peddycoart*, the Supreme Court decided that in the future it would apply more restrictive rules to post-*Peddycoart* acts in the determination of statutory challenges based on § 105, Constitution and § 110, Constitution. As set forth in SECTIONS IV AND VI of this Memorandum, the *Peddycoart* court declared

> *Henceforth* when at its enactment legislation is local in its application it will be a local act and subject to all of the constitutional qualifications

> applicable to it. *With regard to legislation heretofore enacted*, the validity of which is challenged, this court will apply the rules which it has heretofore applied in similar cases. (Emphasis added.)

Although the court stated such new rules for § 105, Constitution, and § 110, Constitution determinations, it actually decided the case upon equal protection grounds. Recall that the court was reviewing a 1915 population bracket act with a minimum population classification of 100,000. As to the challenge that the population classification is not reasonably related to the purpose of the law and permits unequal application, the court recognized the many prior decisions in which the court reasoned that the circumstances of size would bear a reasonable relationship to the purpose of the legislation. However, the Court found no such relation in the city's act. The court noted that the purpose of the act was to provide governmental immunity only to the largest city in the state and stated

> If there is any reasonable relationship between the grant of immunity and the size of its population as denoted by its corporate boundaries we are unable to perceive it. "Judicial ingenuity would exhaust itself in an effort to find any rational basis for the classification it presents.," *City of Birmingham v. Moore*, 248 Ala. 422, 425, 27 So.2d 869, 872 (1946). Such a classification, moreover, arbitrarily denies to citizens the right to pursue against that city remedies for injuries to person and property resulting from the exercise of its governmental functions, while they are free to pursue those same remedies against all others, as we shall show later. This

results in a denial of equal protection of the laws, United States Constitution, Article 14, because it constitutes an irrational difference in the treatment of our citizens, *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961); accord, *Comer v. City of Mobile*, 337 So.2d 742 (Ala. 1976).

We hold, therefore, that § 660 is unconstitutional under both the federal and state constitutions. It violates the equal protection principle and, because of its unreasonable population classification, it cannot qualify as a general law of local application.

The foregoing analysis in *Peddycoart* is in accordance with the test in *Braswell, supra,* as follows.

Test One: The act under attack concerned "fundamental constitutional rights, i.e., the right to seek redress for damages in the courts – with juries.

Test Two: No finding under Test Two, i.e., there was no "inherently suspect" criteria.

Test Three: The act under attack was unnecessarily restrictive and unreasonably related to the legislation's purported purposes. I.e., no conceivable reasonable relationship between the grant of immunity and the size of the population of the municipality.

A similar analysis of *Crandall v. City of Birmingham, supra,* in light of the *Braswell* equal protection test, reflects the following. In *Crandall,* the court had under attack another section of the same act that was attacked in *Peddycoart* (Act No. 257, Legislature 1915). The challenged section prohibited suits for recovery against the city (100,000 population) unless within *90 days* of injury a

sworn statement of claim was filed with the city. In all other municipalities in the state of Alabama the limitation period for the presentation of claims against a municipality is *six months* from the date of injury. The court reconfirmed the legitimacy of local legislation and quoted favorably from *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 70-71, 99 S.Ct. 383, 390, 58 L.Ed.2d 292 (1978)

The Fourteenth Amendment does not prohibit legislation merely because it is special or limited in its application to a particular geographical or political subdivision of the state. *Fort Smith Light Co. v. Paving Dist.*, 274 U.S. 387, 391 [47 S.Ct. 595, 597, 71 L.Ed. 1112] (1927). Rather, the Equal Protection Clause is offended only if the statutes classification "rests on grounds wholly irrelevant to the achievement of the state's objective." *McGowan v. Maryland*, 366 U.S. 420, 425 [81 S.Ct. 1101, 1104, 6 L.Ed.2d 393] (1961); *Kotch v. Bd. of River Port Pilot Comm'rs*, 330 U.S. 552, 556 [67 S.Ct. 910, 912, 91 L.Ed. 1093] (1947).

The *Crandall* court proceeded to look for a rational basis for the statute's classification and stated

We can discern no set of facts within reason which can justify the distinction between Birmingham and all other municipalities in this state. We take judicial notice of the fact that Birmingham is the largest city in the state, exceeding Mobile, the next largest city, by 84,000 people, 1980 census 3rd count. However, we see no connection between the size of a municipality and the need to receive a notice of claim within 90 days instead of six months.

The court observed that Crandall was barred from pursuing his claim because he failed to file it within 90

days, yet it would have been timely filed against any other Alabama city because it was filed within six months of the incident. The court said

> The capriciousness of § 659 is especially evident here because the city, in anticipation of litigation, did investigate fully the claim almost immediately after the incident. The city's contention that it needs to receive notice within 90 days in order to conduct an adequate investigation cannot stand under these facts. Section 659 denies equal protection of the laws of this state and the United States Constitution to persons injured by the fault of the city of Birmingham. (Citing *McGowan v. Maryland, supra,* and *Peddycoart, supra*).

The act was also attacked as violating § 105, and § 110, Constitution. The court referenced *Peddycoart,* and its holding there that the companion section of the same act granting certain immunity to the city was violative of equal protection and in "direct contravention" of a general law on the same subject. The court held that the instant section granting a three-month claim period was also in such "direct contravention" with the general law prescribing a six-month claim period and stated that the only substantive difference between the act and the general law was the time allowed for presentment of the claim. The court stated:

> We are unable to distinguish this case from *Peddycoart v. City of Birmingham,* and, had the constitutionality of § 659 been an issue before this court at the time of that decision it would have been struck down on the same grounds as § 660.

> We hold that 659, a local law, is unconstitutional under Art. IV, § 105, of the Constitution, because it was enacted at variance with an already existing general law on the same subject.

Accordingly, the *Crandall* court similarly applied the *Braswell* equal protection rules as did the *Peddycoart* court. The *Crandall* court found that the companion section to the section attacked in *Peddycoart* providing a three-month claim period was an act

> *Test One:* that concerned *fundamental constitutional rights,* i.e., right to redress in the courts for injuries; and
>
> *Test Three* that it was unnecessarily restrictive and unreasonably related to the legislation's purported purpose, i.e., there was no connection between the size of a municipality and the need to receive a notice of claim within three months instead of six months.

The Act 406 fact situation is completely distinguishable from *Peddycoart* and *Crandall* when tested by the rules of *Braswell.*

> *Test One:* Act 406 does not concern fundamental constitutional rights, i.e., the grant of authority to a county to levy a privilege license tax does not conflict with any right accorded by the Constitution. There is no constitutional freedom from taxation and there is no constitutional right that all counties in the state have to have the same authority to tax. In fact, the opposite is true. As stated in *Eagerton v. Gulas Wrestling Enterprises,* 406 So.2d 366 (1981). "We do note that the power to tax is essentially an attribute of sovereignty confirmed by the people, through the Constitution, on the state, and is vested in

the legislative department." Furthermore, Section 221, Constitution, mandates that the legislature shall not enact any law that takes away the right of counties and cities to impose privilege license taxes. *Peddycoart* and *Crandall* deal with "fundamental constitutional rights" – the right of access to the courts for redress for injuries which is guaranteed by §§ 6, 10, and 11, Constitution of Alabama.

Test Two: Act 406 has no defining criteria that is "inherently suspect," i.e., the defining criteria is "counties of 500,000 population or more." Therefore, the criteria is not based on race, sex, religion, or any other "inherently suspect" criteria.

Test Three: Act 406 criteria is not unnecessarily restrictive and unreasonably related to the legislation's purpose, i.e., the open-ended classification of 500,000 or more has been sustained by numerous Supreme Court decisions as constituting a reasonable general law classification. Under pre-*Peddycoart* rules such classification must be given a liberal interpretation. Moreover, the legislation's purpose, to provide additional revenue, is reasonably related to counties of 500,000 population. Mrs. Cooper's testimony overwhelmingly confirmed the correlation between counties of 500,000 and the needs and demands for services placed upon such counties and the increased cost in highly populated counties of providing services and facilities in response to those demands.

Reference is here made to SECTION II of this Brief and the *Standard Of Review* to be applied in this analysis. Act No. 406 was validly enacted and such enactment was

validated by Amendment No. 389, Constitution. Therefore

> Act No. 406 is presumed to be constitutional, and It is the duty of the court to sustain the constitutionality unless it is *clear beyond a reasonable doubt* that it is in violation of the *fundamental law.*

Additionally, as demonstrated in SECTIONS IV and VI of this Brief, Act No. 406 under pre-*Peddycoart* rules, is a general law of local application and not a local law.

IN THE SUPREME COURT OF ALABAMA

No.

HOYT BEDINGFIELD, JR., et al.,

Plaintiffs-Appellants

v.

JEFFERSON COUNTY, ALABAMA, et al.,

Defendants-Appellees.

CAROLYN PHILLIPS, et al.,

Plaintiffs-Appellants,

v.

THE JEFFERSON COUNTY COMMISSION,

Defendants-Appellees.

ON APPEAL FROM THE CIRCUIT COURT
OF JEFFERSON COUNTY, ALABAMA
IN EQUITY

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

The Alabama AFL-CIO and Public Employees Local Union No. 1317, Laborers International Union of North America move for a leave to file the Amici Curiae Brief which they have submitted to the Court, in support of the appeal in this matter. This motion is based on the following:

1. The amici curiae are the Alabama AFL-CIO and the Public Employees Local Union No. 1317, Laborers International Union of North America. As more fully described below, both represent large numbers of persons who will be affected by the inequitable and unfair tax challenged in this action. Both are employers which will be required to comply with the terms of Ordinance No. 1120.

2. The Alabama AFL-CIO consists of the many local unions affiliated with it and the members of those local unions. In Jefferson County alone, the Alabama AFL-CIO has approximately thirty thousand members almost all of which will have to pay the Jefferson County occupational tax. The members are working people, ranging from laborers and janitors to skilled trades persons. Very few of its members fall within the exceptions to the tax, which allow persons such as highly paid professionals to avoid the tax.

3. The Public Employees Local Union No. 1317, Laborers International Union of North America, consists of approximately seven hundred persons working in Jefferson County. Its members include the nonsupervisory employees of the Street and Sanitation Department and the Park and Recreation Board of the City of Birmingham and the custodial employees of the Birmingham Board of Education. To the best of the knowledge of Local No. 1317, none of its members will qualify for the exceptions to the Jefferson County occupational tax. By and large, the members of Local No. 1371 are paid far less in

wages than are the highly paid professionals who are exempted from the tax.

Respectfully submitted,

/s/ Guy Larry Tipton
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above and foregoing and has been served upon the following counsel of record by depositing same in the U. S. Mail, postage prepaid, on this the 17th day of December, 1987:

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ON APPEAL FROM THE CIRCUIT COURT
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IN EQUITY

AMICI BRIEF ON BEHALF OF ALABAMA AFL-CIO AND THE PUBLIC EMPLOYEES LOCAL UNION NO. 1317, LABORERS INTERNATIONAL UNION OF NORTH AMERICA

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STATEMENT OF THE CASE

The Alabama AFL-CIO and Public Employees Local 1317, Labor International Union of North America, adopt the Statement of the Case submitted by the appellants.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Is the Occupational Tax Adopted by the Jefferson County Commission Inequitable in Light of its Many Exemptions, Indicating that it was not Intended by the Legislature and that it Violates Principles of Equal Protection?

STATEMENT OF THE FACTS

These amici curiae adopt the Statement of the Facts of the appellants.

INTEREST OF AMICI CURIAE

The amici curiae are the Alabama AFL-CIO and the Public Employees Local Union No. 1317, Laborers International Union of North America. As more fully described below, both represent large numbers of persons who will be affected by the inequitable and unfair tax challenged in this action. Both are employers which will be required to comply with the terms of Ordinance No. 1120.

The Alabama AFL-CIO consists of the many local unions affiliated with it and the members of those local unions. In Jefferson County alone, the Alabama AFL-CIO has approximately thirty thousand members almost all of which will have to pay the Jefferson County occupational tax. The members are working people, ranging from laborers and janitors to skilled trades persons. Very few of its members fall within the exceptions to the tax, which allow persons such as highly paid professionals to avoid the tax.

The Public Employees Local Union No. 1317, Laborers International Union of North America, consists of approximately seven hundreds persons working in Jefferson County. Its members include the nonsupervisory employees of the Street and Sanitation Department and the Park and Recreation Board of the City of Birmingham and the custodial employees of the Birmingham Board of Education. To the best of the knowledge of Local No. 1317, none of its members will qualify for the exceptions to the Jefferson County occupational tax. By and large, the members of Local No. 1317 are paid far less in wages than are the highly paid professionals who are exempted from the tax.

The amici should note that they are not arguing that their members should be exempted from paying a fair and equitable share of taxes. Obviously, taxes are a price we pay for living in a civilized society. However, the amici object strongly to their members being forced to pay a tax which exempts many of the most highly paid citizens of Jefferson County, whose license taxes are even proportionately less than the tax being challenged in this action.

ARGUMENT

I. THE EXEMPTIONS TO THE TAX MAKE IT INEQUITABLE, SHOWING THAT IT WAS NOT INTENDED BY THE LEGISLATURE AND THAT IT VIOLATES PRINCIPLES OF EQUAL PROTECTION.

The exemptions to the tax make it a highly inequitable tax. The effects of those exemptions were described briefly in the testimony of Hoyt Bedingfield, Jr. (Tr. 23 *et*

seq.). The highest paid employee of the City of Birmingham, the City Attorney, is exempted from paying the Jefferson County occupational tax, while the much lower paid members of the amici, who are collecting garbage and repairing streets, must pay the tax. The unfairness is not limited to employees of the City of Birmingham. As was pointed out by the Jefferson County Revenue Director and by the two dissenting members of the Jefferson County Commission, a highly paid private professional such as a doctor, dentist or attorney is exempted from the tax, while his or her secretary must pay it.

The equitability of the tax has special significance in this case. The evidence includes a memo from the person who was Acting Finance Director at the time that Act No. 406 was passed and, in the terms of the current Revenue Director, was being "implemented". The Revenue Director at the time pointed out that Act No. 406 was passed to make County taxation more "equitable". (Court Ex. 1, App. "D"). Twenty years later, the Jefferson County Commission has attempted to use that Act to establish what everyone agrees is a very inequitable tax because of the exemptions.

Under well established principles of statutory construction, the opinion of the Revenue Director at the time of the passage of Act No. 406 is especially important in determining what was intended by the Act. *E.g., Eagerton v. Terra Resources, Inc.*, 426 So.2d 807, 809 (Ala. 1982). As unions know too well, long standing administrative construction is frequently followed by this Court. *International Union of Operating Engineers Local Union No. 321 v. Water Works Board of the City of Birmingham*, 276 Ala. 462,

465, 163 So.2d 619 (1964). The Court should make no exception for Jefferson County.

In addition, the exemptions in the County occupational tax are crucial to the claim of equal protection which is made in this case but which the Circuit Court did not address. The amici cannot conceive of any basis for saying that a tax should fall most heavily on those least able to pay it. By exempting highly paid professionals when those persons pay proportionately less in license taxes, the County has made distinctions that have no rational basis. Those distinctions cannot withstand scrutiny under equal protection principles mandated by the State and Federal Constitutions. *E.g., City of Hueytown v. Jiffy Chek Company of Alabama*, 342 So.2d 761 (Ala. 1977).

CONCLUSION

For the reasons stated herein and in the brief of the appellants, this Court should reverse the Circuit Court and require that the Jefferson County occupational tax be declared invalid.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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IN THE SUPREME COURT OF ALABAMA

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Defendants-Appellees.

ON APPEAL FROM THE CIRCUIT COURT
OF JEFFERSON COUNTY, ALABAMA
IN EQUITY

MOTION FOR LEAVE TO FILE AMICUS BRIEF

The Birmingham Area Chamber of Commerce hereby moves for leave to file the attached amicus brief. This motion is based on the following:

1. The Birmingham Area Chamber of Commerce has more than 4000 members, over 3000 of which are businesses located in Jefferson County. Those businesses will

be directly and dramatically affected by the Jefferson County occupational tax which is being challenged in this action. All such businesses will incur the costs of implementing, collecting, and paying over the tax. One member alone, Sonat, is spending approximately $20,000.00 to make changes to its payroll system in order to comply with the tax. In addition, businesses located in Jefferson County are competing with businesses in nearby states and other areas of Alabama and they have now been placed at a competitive disadvantage. Examples of such competitive disadvantages have been seen most clearly in the instances of office buildings which were already being developed. Potential tenants of those buildings are now locating in other areas in order to avoid the payment of the Jefferson County occupational tax.

2. Moreover, as described in the amicus curiae brief, the Birmingham Area Chamber of Commerce was involved in making a study and then reviewing it with the County at the times preceding the adoption of the occupational tax. The Chamber and others had advised the County Commission that for many important reasons the occupational tax was one of the least desirable of the possible alternatives to dealing with the financial problems of Jefferson County.

3. The Birmingham Area Chamber of Commerce is charged with the responsibility of promoting economic growth throughout the Birmingham metropolitan area and employs business development specialists to carry out this function. It is The Chamber's belief that the proposed occupational tax will be considered as an income tax and that since no similar tax would be collected in other Alabama counties or in neighboring states,

Jefferson County will no longer be able to compete as effectively and that this lack of competitiveness will cost the County hundreds of future jobs and thousands of dollars in lost tax revenues.

Respectfully submitted,

/s/ William R. Tillery
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CERTIFICATE OF SERVICE

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AMICUS BRIEF ON BEHALF OF THE BIRMINGHAM AREA CHAMBER OF COMMERCE

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STATEMENT OF THE CASE

The Birmingham Area Chamber of Commerce adopts the appellants' statement of the case.

INTEREST OF THE AMICUS CURIAE

The Birmingham Area Chamber of Commerce has more than 4000 members, over 3000 of which are businesses located in Jefferson County. Those businesses will be directly and dramatically affected by the Jefferson County occupational tax which is being challenged in this

action. All such businesses will incur the costs of implementing, collecting, and paying over the tax. One member alone, Sonat, is spending approximately $20,000.00 to make changes to its payroll system in order to comply with the tax. In addition, businesses located in Jefferson County are competing with businesses in nearby states and other areas of Alabama, and they have now been placed at a competitive disadvantage. Examples of such competitive disadvantages have been seen most clearly in the instances of office buildings which were already being developed. Potential tenants of those buildings are now locating in other areas in order to avoid the payment of the Jefferson County occupational tax.

Moreover, as more fully described in the Statement of Facts, the Birmingham Area Chamber of Commerce was involved in performing studies on county financing and then discussing these with the County at the times preceding the adoption of the occupational tax. The Chamber and others had advised the County Commission that for many important reasons the occupational tax was one of the least desirable of the possible alternatives to dealing with the financial problems of Jefferson County.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. When the Legislature Enacted Act No. 406 in 1967, Did it Intend to Authorize Jefferson County to Levy, Assess and Collect an Occupational Tax?

II. Even Assuming for Purposes of Argument that Jefferson County May Levy an Occupational Tax, Does the County Have the Authority to Assess and Collect an Occupational Tax?

STATEMENT OF THE FACTS

In 1986, the Birmingham Area Chamber of Commerce assisted the Jefferson County Commission in conducting a study about the various ways to address financial problems being experienced by and projected for the County. The Chamber arranged for and assisted the County Commission by obtaining volunteers to conduct the study. The study made certain recommendations and concluded that an occupational tax was one of the most undesirable means to address the problem.

In 1987, a new County Commission came into office, and it then spent $250,000 on a similar study conducted jointly by the accounting firms of Coopers & Lybrand and Banks, Finley White & Company. That study made a number of recommendations for cost savings and for revenue increases by the County.

It is out of this study by Coopers & Lybrand and Banks, Finley White & Company that the idea that Act No. 406 might authorize an occupational tax first developed. The Chamber understands that there is some discussion of this in the deposition of the County Revenue Director, Clint Ritchie, which has been filed with the Court.

It is most significant to note that the Jefferson County Commission has not adopted any of the measures for cost savings proposed by the study.

It is also important to note that the Chamber projects that the occupational tax will bring in as much as twenty-

five million dollars to the County, when in fact the funding gap projected to the County is much closer to approximately three million dollars even without considering other increases in taxes which the Jefferson County Commission is implementing. Those other increases in taxes, according to the Chamber's projection, will more than make up for the funding gap being experienced by the County.

From the standpoint of the numerous businesses in Jefferson County who are now having to undergo the expense of implementing the occupational tax, it is important for the Court to recognize that numerous legislators in Jefferson County have publicly stated that they will repeal the County occupational tax through legislation as soon as the next session of the Legislature begins, and, as of the present time no legislator has publicly supported the occupational tax. This means that businesses within the County will have spent large sums of money to implement a tax which will be in effect for a very few months, and then must spend more to change back to the original system. One example of the cost of implementation is with Sonat, which is spending approximately $20,000.00 for payroll system changes necessary to put the tax into effect.

The economic effects of the tax on Jefferson County are already being felt. Businesses within the County are now put at a competitive disadvantage with businesses outside of the County. The effect of this competitive disadvantage is seen most clearly in the instances of office buildings which were already being developed. Potential tenants of theses [sic] Jefferson County office buildings are now known to be locating in other areas to avoid

payment of the Jefferson County occupational tax The effects are seen most dramatically in office building developments located only a short distance apart. If such a development is located within the boundaries of Jefferson County, then any business leasing in such a building will have to deduct occupational taxes from its employees, and any employees whom it locates there, including decision making employees, will have to pay the occupational tax.

On the other hand, if the building were located only a short distance away, but in another County, then there would be no such tax. Especially when a decision making employee will have the tax deducted from his or her salary, the location decision will obviously be against locating in Jefferson County.

ARGUMENT

I. THE OCCUPATIONAL TAX WAS NEVER INTENDED BY ACT NO. 406.

The Chamber adopts the arguments of the appellant regarding the intent of Act No. 406. As the County Revenue Director has testified, and as an earlier Revenue Director has indicated in writing, Act No. 406 never was intended to authorize an occupational tax.

II. EVEN ASSUMING FOR PURPOSES OF ARGUMENT THAT JEFFERSON COUNTY MAY LEVY AN OCCUPATIONAL TAX, THERE IS NO AUTHORITY FOR THE COUNTY TO ASSESS OR COLLECT THE TAX.

From the standpoint of the many businesses who are members of the Birmingham Area Chamber of Commerce

and who are being required to implement the occupational tax, apparently under the threat of possible criminal penalties, an important issue is whether there is any authority for the County to assess, implement or require the collection of the occupational tax. On that issue the Circuit Court seemed to indicate that it was initially inclined to rule for the plaintiffs. However, the Circuit Court incorrectly determined that the County had the implied authority for the collection and criminal measures to be imposed into the terms of the tax. There is plainly no such authority for the implementation and collection procedures of the tax. As the defendants have recognized in the Circuit Court, there is a distinction between the authority to levy a tax and the authority to assess or collect a tax. The Constitution of the State of Alabama recognizes that distinction, and prohibits local laws for assessment or collection of taxes. E.g., Constitution of Alabama of 1901, Article IV § 104. Since the County has cited only a local law, Act No. 406, as its authority for the occupational tax, it has no authority to assess, implement or collect the tax.

By contrast, where the Legislature has truly intended for a tax to be collected, it has provided for it in the Alabama Code. The means for collecting the license taxes, which were authorized by Act No. 406, are provided for in *Ala. Code* § 40-12-2 (1975). The Legislature has provided specific authority for the implementation of and collection of a municipal occupational tax. See *Ala. Code* § 11-51-90 *et seq.* (1975). However, there is no comparable authority for a county, even for Jefferson County.

Thus, the assessment and collection provisions of the County occupational tax should be declared invalid.

CONCLUSION

For the reasons stated in the brief of the appellants, and for the reasons stated herein, this Court should reverse the Circuit Court and require that the County occupational tax be declared invalid.

Respectfully submitted,

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IN THE SUPREME COURT OF ALABAMA

No.

HOYT BEDINGFIELD, JR., et al.,

Plaintiffs-Appellants

v.

JEFFERSON COUNTY, ALABAMA, et al.,

Defendants-Appellees.

CAROLYN PHILLIPS, et al.,

Plaintiffs-Appellants,

v.

THE JEFFERSON COUNTY COMMISSION,

Defendants-Appellees.

ON APPEAL FROM THE CIRCUIT COURT
OF JEFFERSON COUNTY, ALABAMA
IN EQUITY

AMICUS CURIAE BRIEF ON BEHALF OF SHELBY COUNTY, ALABAMA

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STATEMENT OF THE CASE

Amicus curiae Shelby County adopts the Statement of the Case contained in the Appellants' primary brief.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Shelby County adopts the Statement of the Issues contained in the appellants' primary brief, alleges the general invalidity of Ordinance No. 1120 and in addition thereto states the following additional issues presented for review:

1. Does Ordinance No. 1120 adopted by the Jefferson County Commission Place an Undue Burden on Shelby County Employers and Workers by Virtue of the Reporting Requirements Associated with the Tax?

2. Does the Jefferson County Commission have Jurisdiction to Enact an Ordinance Which Requires Record Keeping, Collections, and Payments by Shelby County Employers and Employees?

3. Even Assuming for Purposes of Argument that Jefferson County May Levy an Occupational Tax on Businesses in Shelby County, is there any Authority for Jefferson County to Assess or Collect such a Tax from Employers in Shelby County?

4. Are the Needs of Jefferson County Substantially Greater than those of Shelby County, which Includes the Most Rapidly Growing Unincorporated Area of the State?

5. Will Enforcement of Ordinance 1120 Against Citizens of Shelby County Constitute Taxation without Representation?

STATEMENT OF THE FACTS

Amicus curiae Shelby County adopts the Statement of the Facts contained in the Appellants' primary brief in this appeal.

STATEMENT OF INTEREST

Shelby County, Alabama is located south of Jefferson County, Alabama. Due to its geographical proximity to Jefferson County as well as the direction of growth in the Birmingham metropolitan area, a great number of people live in Shelby County and work in Jefferson County. This group of people may be divided into two categories: 1) those who reside in Shelby County but commute each day to offices or jobs in Jefferson County; and 2) those who reside in Shelby County, are employed by employers in Shelby County or have offices in Shelby County, but who actually perform all or part of their work in Jefferson County.

The first category of Shelby County is a large one. The last available statistics from the United States Census Bureau show that, as of 1980, more than 12,000 people lived in Shelby County but work in Birmingham, Bessemer, Fairfield, Mountain Brook, Homewood, or elsewhere in Jefferson County. This number constituted approximately 44% of the work force in Shelby County.[1] The numbers are sure to have increased significantly since 1980. These citizens would feel the impact of the occupational tax ordinance at issue in this case, Jefferson County Ordinance No. 1120 (hereinafter, "Ordinance"), in the same way as a Birmingham resident who is employed in Jefferson County.

The second category of Shelby County is affected, not only by the payment of the tax itself, but by the record keeping and collection provisions of the ordinance. In light of the recent growth in the area of the Riverchase Galleria, both residential and commercial, it is likely that the number of affected citizens is comparable to that of the first category.

According to the terms of the Ordinance, Shelby County businesses which employ persons to perform all or part of their work in Jefferson County are charged with the responsibility of figuring the proportion of the employee's income derived by working in Jefferson County; deducting the occupational tax from that subject income; and filing occupational tax returns for all such

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[1] These statistics were provided by the Alabama Department of Economic and Community Affairs.

employees with the Director of Revenue for Jefferson County.

This burden will fall most heavily on businesses who employ non-professionals in the middle-to lower income ranges, because the ordinance exempts persons who pay a license tax to the State of Alabama from the occupational tax. For example, a television repair business which employs persons to perform television repairs at homes in the north Shelby County south Jefferson County area would be required to figure what proportion of each employee's work is done in Jefferson County, deduct the proportionate tax from its employees' paychecks, pay the tax to the Jefferson County Director of Revenue, file regular returns with the Director, and keep records relating to these transactions for at least five years. Obviously, this will create a bookkeeping nightmare for the many small-to medium sized businesses in Shelby County.

ARGUMENT

I. ORDINANCE NO. 1120 PLACES AN UNDUE BURDEN ON SHELBY COUNTY EMPLOYERS AND WORKERS BY VIRTUE OF THE REPORTING REQUIREMENTS CONTAINED IN SECTIONS FOUR AND FIVE

Section Four of Jefferson County Ordinance No. 1120 (hereinafter, "Ordinance") requires any employer who "employs any person in any vocation, occupation, calling or profession in Jefferson County" [Section 1(E)] to deduct license fees required by the occupational tax ordinance from the employer's payments to the employee. After those deductions are made, the employer is further

required to submit monthly or quarterly returns to the Jefferson County Director of Revenue. Ordinance, § 4. In the event that the employer does not file the required returns, the employee must file a return. Ordinance, § 5.

The ordinance makes no exception for employers or employees whose place of business or main office is located in another county. Therefore, the filing and withholding requirements would place a heavy burden on Shelby County businesses that employ persons to actually perform work in Jefferson County. The Shelby County employer is faced with a mound of additional paperwork necessitated by the payroll deduction, the filing of returns to yet another governmental agency, and incidental bookkeeping relating to the occupational tax. None of this paperwork, which in itself constitutes a significant expense to the employer, benefits Shelby County.

By the terms of the Ordinance, Shelby County employers would be faced with the compilation of the following information which is required to be given to the Jefferson County Director of Revenue:

1. The gross amount of each employee's compensation;

2. The amount of license fees deducted and paid during the last calendar year by the employer from the employee's compensation;

3. The last known address of each such employee.

In addition, the employer is required to keep accurate records of the deductions, returns, etc., for five years

after the taxed wages or payments were earned. Ordinance, Section 4.

Those requirements create an entirely new set of records and calculations which must be established and maintained by Shelby County employers, with no accompanying benefit to that employer.

II. THE JEFFERSON COUNTY COMMISSION IS WITHOUT JURISDICTION TO ENACT AN ORDINANCE WHICH REQUIRES SUCH RECORD KEEPING AND PAYMENTS BY SHELBY COUNTY EMPLOYERS AND EMPLOYEES.

It is self-evident that a county commission has no power to enact or enforce ordinances to apply to persons or property outside the geographical boundaries of its own county. The commission's powers extend only as for [sic] as the county line.

Furthermore, the Jefferson County Commission, as a governmental agency, has "no power and is subject to no duty not originating from the law creating it or in the statutes declaring such power and duty." *State ex rel. Tallapoosa County v. Butler*, 227 Ala. 212, 214, 149 So. 101 (Ala. 1933), *citing State ex rel. Chilton County v. Butler*, 225 Ala. 191, 142 So. 531. The Jefferson County Commission has no inherent jurisdiction to make *any* laws, much less laws which apply to or burden other counties. *See Tuscaloosa County v. Great So. R. Co.*, 150 So. 328, 227 Ala. 428, 432 (Ala. 1933); *see also Jefferson County v. City of Birmingham*, 248 Ala. 319, 325, 27 So.2d 584 (Ala. 1946) (county has no inherent power of taxation.) The enumeration of powers granted to county commissions found in

Ala. Code § 11-3-11 (1975) contains no provision for the passage of an ordinance affecting other counties; neither is there any such provision elsewhere in the Code or the 1901 Constitution.

Nevertheless, the Jefferson County Commission here attempts to implement a tax scheme which will force individual citizens and businesses in Shelby County to, in effect, help Jefferson County collect and keep track of its tax revenues. To make matters worse, those revenues collected will have been generated by Shelby County labor. The administration of the tax filing system is financed by investments made and property owned in Shelby County. Despite this investment into the maintenance of records for the benefit of Jefferson County, neither Shelby County nor the burdened businessman will receive a penny of the tax revenues generated by the law. Aside from the obvious unfairness in this system, the enacting Commission simply has no authority to pass such a tax ordinance and apply it outside its own boundaries.

III. EVEN ASSUMING FOR PURPOSES OF ARGUMENT THAT JEFFERSON COUNTY MAY LEVY AN OCCUPATIONAL TAX ON BUSINESSES IN SHELBY COUNTY, THERE IS NO AUTHORITY FOR JEFFERSON COUNTY TO ASSESS OR COLLECT THE TAX.

Even if Jefferson could somehow impose the requirements of the occupational tax on businesses in Shelby County, there is no authority for the County to assess, implement or require the collection of the occupational tax. On that issue the Circuit Court seemed to indicate

that it was initially inclined to rule for the plaintiffs. However, the Circuit Court incorrectly determined that the County had the implied authority for the collection and criminal measures to be imposed into the terms of the tax. There is plainly no such authority for the implementation and collection procedures of the tax. As the defendants have recognized in the Circuit Court, there is a distinction between the authority to levy a tax and the authority to assess or collect a tax. The Constitution of the State of Alabama recognizes that distinction, and prohibits local laws for assessment or collection of taxes. E.g., Ala. Const. of 1901, Art. IV § 104. Since the County has cited only a local law, Act No. 406, as its authority for the occupational tax, it has no authority to assess, implement or collect the tax.

By contrast, where the Legislature has truly intended for a tax to be collected, it has provided for it in the Alabama Code. The means for collecting the license taxes, which were authorized by Act No. 406, are provided for in *Ala. Code* § 40-12-2 (1975). The Legislature has provided specific authority for the implementation of and collection of a municipal occupational tax. See *Ala. Code* § 11-51-90 *et seq.* (1975). However, there is no comparable authority for a county, even for Jefferson County.

Thus, the assessment and collection provisions of the County occupational tax should be declared invalid.

IV. THE NEEDS OF JEFFERSON COUNTY ARE NO GREATER THAN THOSE OF SHELBY COUNTY.

The only evidence which Jefferson County offered at trial was apparently an attempt to show the needs of an

urban county. However, it should be recognized that the fastest growing area in the State is in North Shelby County, much of which is outside the corporate boundaries of any municipality. While Jefferson County enjoys the shopping centers such as the Galleria which bring in enormous amounts of tax revenue, Shelby County has the financial burden of providing many services such as education which the shoppers return to their homes.

It is inconceivable that Jefferson County, and only Jefferson County, can justify a special tax, which the Legislature could not have been thinking about when it enacted Act No. 406 in 1967, and then impose on businesses in Shelby County the implementation, collection, and record-keeping requirements associated with the tax. The special treatment which Jefferson County asserts here is even less tenable than that asserted and rejected in *Crandall v. City of Birmingham*, 442 So.2d 77, 79 (Ala. 1983).

If the Legislature had intended to authorize counties in Alabama to levy, implement and collect an occupational tax, then it would have done so in the same manner as it did for municipalities in *Ala. Code* § 11-51-90 *et seq.* (1975). Especially since "it is established that taxing statutes should be strictly construed against the taxing power" *Alabama Farm Bureau Mutual Casualty Insurance Co. v. City of Hartselle*, 460 So.2d 1219, 1223 (Ala. 1984), this Court should hold that the Jefferson County occupational tax is invalid.

V. ENFORCEMENT OF ORDINANCE 1120 AGAINST THE CITIZENS OF SHELBY COUNTY WOULD CONSTITUTE TAXATION WITHOUT REPRESENTATION

The idea that citizens of a civilized nation should not be taxed unless they are represented in the legislative body that enacted the tax is one that lies at the very core of our concept of American democracy. In late 1773 and the spring of 1774, colonial Americans protested British imposition of duties and other taxes upon Americans who had no representation in Parliament and virtually no communication with either the Crown or the colonial government. *See The Almanac of American History* 112-114 (A. M. Schlesinger, Jr., gen. ed. 1983). This was one of the primary problems caused by British governance which led to the American Revolution. Present day courts and governmental bodies must not be allowed to forget this concept, so basic to our system of government and our notion of "liberty."

The power to levy taxes is a purely legislative power. *Champion v. McLean*, 266 Ala. 103, 117, 95 So.2d 82 (1957). It is an incident of sovereignty, *id.*, and, as such, it cannot be delegated. In fact, the Alabama Constitution specifically forbids delegation of the power to levy taxes. Ala. Const. of 1901, Art. XI, § 212. While the legislature has amended the state constitution in such a way as to enable counties and municipalities to levy and collect taxes in certain situations, this is not the case here, for two reasons.

First, there has been no valid action by the legislature giving Jefferson County the authority to enact and

enforce Ordinance 1120. The Act upon which the appellee relies was never intended to allow Jefferson County to pass an occupational tax. Furthermore, the County's later attempts to have the Legislature pass such an act failed, resulting in this thinly-veiled resort to reliance on a twenty-year-old statute. These points are addressed in detail in the appellants' brief; Shelby County adopts and recommends those arguments to the Court.

Also, Section 212 of Constitution is premised upon the idea that no body, other than a legislative body elected by those subject to a tax, has the authority, under our system of government, to levy a tax. Because the source of power for our state government is the citizenry itself, see Ala. Const. of 1901, Art. I, § 2, the citizenry must elect the taxing power.

As the Justices of the Supreme Court noted to the Legislature, the delegation of tax assessment duties to one not elected by the taxpayers is violative of § 212. *Opinion of the Justices*, 379 So.2d 939 (1980). Again, this opinion is premised on the notion that the grant of assessment authority to one over whom the subject electorate has no political control contravenes our system of representative government.

The power to tax is a broad power indeed. Outside of the limitations created by the constitutional guarantees of equal protection and due process, the only real check on that power is that of the vote. If that means of control is lost by virtue of one county's exercise of taxing, and the concomitant regulatory, power over the citizens of another county, then there is no check whatsoever.

VI. AMICUS CURIAE SHELBY COUNTY ADOPTS ALL OF THE ARGUMENTS MADE BY APPELLANTS BEDINGFIELD AND THE CITY OF BIRMINGHAM IN THEIR BRIEF.

The appellants' brief submitted in this case thoroughly examines the legislative history of Act No. 406, the legislation upon which the appellee relies for the authority to enact and enforce Ordinance 1120, as well as the other Alabama law in this area. As the appellants have shown, there is clearly no authority for Jefferson County to force this occupational tax upon the amici in this case or anyone else. Furthermore, even if this Court were to find that Act No. 406 was intended to provide this authority, the Act is unconstitutional as applied in this case.

Shelby County joins in and adopts all of the arguments advanced by the appellants. The damage which the appellants and citizens of Jefferson County will suffer if this tax is allowed to stand will enure doubly to the citizens of Shelby County who will be affected by the Ordinance, as the latter will see no benefit or gain whatsoever from their payment of this inequitable tax.

CONCLUSION

For the reasons stated in the brief of the appellants, and for the reasons stated herein, this Court should

reverse the Circuit Court and require that the County occupational tax be declared invalid.

Respectfully submitted,

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Hoyt BEDINGFIELD, Jr., in his capacity as the acting director of finance of the city of Birmingham, et al.

v.

JEFFERSON COUNTY, et al.

87-316.

Supreme Court of Alabama.

May 20, 1988.

City challenged constitutionality of county ordinance establishing occupational tax. The Circuit Court, Jefferson County, Braxton L. Kittrell, Jr., J., upheld ordinance, and appeal was taken. The Supreme Court, Beatty, J., held that: (1) statute authorized county to levy occupational tax; (2) statute was general, rather than local legislation; and (3) statute authorizing levy of tax provided for collection of such tax.

Affirmed.

Donald V. Watkins of Watkins, Carter & Knight and Joe R. Whatley, Jr., of Falkenberry & Whatley and David A. Sullivan and Samuel Fisher, Birmingham, for appellants.

Edwin A. Strickland, Birmingham, for appellees.

Guy Larry Tipton, Birmingham, for amicus curiae Alabama AFL-CIO and the public employees local union No. 1317, Laborers Intern. Union of North America.

William R. Tillery, Birmingham, for amicus curiae Birmingham Area Chamber of Commerce.

Frank C. Ellis, Jr., of Wallace, Ellis, Head & Fowler, Columbiana, for amicus curiae Shelby County.

BEATTY, Justice.

This is an appeal by Hoyt Bedingfield, Jr., as acting director of finance of the City of Birmingham, and the City of Birmingham from a judgment upholding a Jefferson County ordinance, specifically Ordinance No. 1120, establishing an occupational tax. We affirm.

The action was filed on October 19, 1987, and was consolidated for trial with the case of *Carolyn Phillips, et al. v. Jefferson County Commission.*

Ordinance No. 1120 levies a license or privilege tax on natural persons engaged in any vocation, occupation, calling, or profession who are not required by law to pay any license or privilege tax to the state or county. This tax was promulgated by Jefferson County under the authority of Act No. 406, approved September 7, 1967, *Acts of Alabama 1967,* at 21-23. Pertinent sections thereof are quoted below:

"AN ACT

"To authorize the governing body of any county of the State having a population of 500,000 or more, according to the last or any subsequent Federal census, to levy a business or privilege tax upon any business, vocation, occupation, calling or profession for which a license or privilege tax is not required for either the State of Alabama or the county by the laws of the State of Alabama, and to limit the amount of any such business or privilege tax.

"Be It Enacted by the Legislature of Alabama:

"Section 1. This Act shall apply to any county of the State of Alabama having a population of 500,000 or more, according to the last or any subsequent federal census, and to no other county.

". . . .

"Section 3. The purpose of this Act is to equalize the burden of taxation by authorizing the county to impose a license or privilege tax upon persons now engaging in certain businesses without paying any license tax thereon to either the state or county.

"Section 4. The governing body of the county is hereby authorized to levy a license or privilege tax upon any person for engaging in any business for which he is not required by law to pay any license or privilege tax to either the State of Alabama or the county by any of the following: Article 1, Chapter 20, Title 51; Sections 176, 177, 178, 180, 182, 183, 184, 186, 429, and 826 in Title 51 of the Code of Alabama of 1940 as amended.

"When a person is engaged in more than one business for one or more of which a license or privilege tax is required to be paid to the State or the county but for one or more of which no county but for one or more of which no license or privilege tax is required to be paid to the State or county, the county governing body shall have the authority to levy a license or privilege tax upon that business, or those businesses, for engaging in which such person is not required to pay any license or privilege tax to the State or county.

"Section 5. The tax hereby levied shall be paid to that officer or employee of the county chargeable with the duty of collecting license or privilege taxes payable to the county.

"Section 6. No license or privilege tax levied by the governing body of the county on any person, for engaging in any business shall be at a rate which is in excess of the rate of license or privilege tax levied by the largest municipality of the county on the same or similar type of business activity."

Allegations of unconstitutionality made below were denied by the defendants. Following discovery, testimony taken in open court, and stipulation, the Jefferson Circuit Court upheld the ordinance, and this appeal followed. Because a number of issues are presented here, we shall treat them *seriatim*.

I.

Did Act No. 406 manifest a legislative intent to authorize Jefferson County to levy an occupational tax?

Plaintiffs' argument here is multifaceted. First, they contend that the stated purpose of the Act is to authorize a tax only upon "certain businesses," and not "occupations." Further, plaintiffs argue that § 6 of Act No. 406 does not permit a privilege tax "which is in excess of the rate of license or privilege tax levied by the largest municipality of the County on the same or similar type of business activity," meaning that Jefferson County could not implement the Act by levying a tax in excess of that which had been levied by Birmingham. Because Birmingham had no such privilege tax in 1967, plaintiffs

argue, any county tax under Act No. 406 would offend the Act. Finally, according to plaintiffs, the county's own implementation of the Act when it was enacted in 1967, as only a licensing code authorizing licensing of certain businesses, gives weight to the limiting nature of Act No. 406.

We must respectfully reject these arguments. While we are mindful that taxing statutes are to be strictly construed, *State v. Seals Piano Co.*, 209 Ala. 93, 95 So. 451 (1923), it does not offend that principle to uphold this statute. Indeed, the express language of the Act authorizes the county "to levy a business or privilege tax upon any business, vocation, occupation, calling or profession." When the intention of the legislature is so apparent from the face of a statute that there can be no question as to its meaning, there is no room for construction. *American Institute of Psychotherapy v. Alabama Board of Examiners in Psychology*, 410 So.2d 54 (Ala.1982). Thus, § 4 is to be read as authorizing a privilege tax "upon any person for engaging in any business [or occupation]."

Municipal licensing authority has existed at least since the Code of 1907, see Code of 1975, § 11-51-90. Birmingham originally adopted its licensing code as early as 1916, and in 1967 it had an extensive catalog of business categories subject thereto. However, it was not until 1970 that Birmingham itself adopted Ordinance No. 70-76, providing for a license fee for occupations and professions. Given the fact that Birmingham had possessed the authority under state law to impose an occupational privilege tax since 1907, it is clear that by § 6 of Act No. 406 the legislature, cognizant of that power, decided

to restrict the county's authority to a maximum as established by Birmingham's occupational privilege tax. It is a fundamental principle that the legislature in enacting a statute, is presumed to have full knowledge and information on prior and existing law on the subject of the statute. *Ex parte Love*, 513 So.2d 24 (Ala.1987). Thus, we cannot agree with plaintiffs that Act No. 406 required Jefferson County to implement its authority contemporaneously thereunder, or lose it altogether. The Act itself contains no such limiting language. True, Jefferson County did not implement the "occupational" aspect of the statute until 1987. Nevertheless, the authority to do so continued.[1]

Finally, we are not persuaded by plaintiffs' argument that, in construing Act No. 406, this Court should defer to the county's alleged contemporaneous interpretation of the Act. Because we do not find the Act doubtful in its meaning, we need not resort to an alleged contemporaneous interpretation by the county.

II.

Is Act No. 406 unconstitutional as violating limitations on local legislation as explained in *Peddycoart v. City of Birmingham*, 354 So.2d 808 (Ala.1978)?

According to plaintiffs, Act No. 406 violates the mandate of *Peddycoart* in two respects: (1) the general laws of

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[1] By stipulation, it was established that, while Birmingham itself adopted its license code as early as 1916, and possessed an extensive license code in 1967, it did not establish its occupational tax until 1970.

Alabama have preempted the field of license and privilege taxation to prevent reliance upon local legislation, and thus Act No. 406 violates Section 105 of the Constitution; and (2) the population classification of Act No. 406 (500,000 or more), which makes it a "bracket bill," lacks a reasonable relationship with the statute's purpose.

Commenting upon *Peddycoart* in *Freeman v. Purvis*, 400 So.2d 389 (Ala.1981), this Court stated:

> "We must point out, however, that following the *Peddycoart* decision which was released on January 13, 1978, two amendments to the Alabama Constitution of 1901 were ratified by the people: Amendment No. 375, ratified on November 20, 1978, and Amendment No. 389, ratified on November 4, 1980. Because the latter Amendment is pertinent, we quote it here:
>
> " 'Any statute that was otherwise valid and constitutional that was enacted before January 13, 1978, by the legislature of this state and was a general act of local application on a population basis, that applied only to a certain county or counties or a municipality or municipalities of this state, shall not be declared invalid or unconstitutional by any court of this state because it was not properly advertised in compliance with section 106 of this Constitution.
>
> " 'All such population based acts shall forever apply only to the county or counties or municipality or municipalities to which they applied on January 13, 1978, and no other, despite changes in population.'
>
> ". . . .

> "The effect of this Amendment was to validate all 'bracket bills' enacted without advertising before January 13, 1978, the date of the *Peddycoart* decision, and which were not otherwise unconstitutional. . . . "

Act No. 406 was approved in 1967, well before the date of the *Peddycoart* decision of January 13, 1978, and, as a general law of local application, was validated by Amendment 389 even though it was not advertised under Section 106 of the Constitution of 1901.

Even under pre-*Peddycoart* standards, Act No. 406 must survive a constitutional attack based on a supposed lack of relationship between its purpose and the expressed population classification. As observed in *Dearborn v. Johnson*, 234 Ala. 84, 173 So. 864 (1937), on that subject, much is left to legislative discretion in fixing that classification and in recognizing that purpose. In *Couch v. Rodgers*, 253 Ala. 533, 45 So.2d 699 (1950), this Court reviewed a number of its decisions that had upheld "bracket bills" of substantial minimum, but no maximum, population classifications:

> "We have numerous decisions which give illustration to the principle. We will not undertake to analyze them all, but only such as seem to shed light upon the instant suit. In the case of *"Wages v. State*, 225 Ala. 2, 141 So. 707, 708 [1932], this Court was dealing with an act similar to the one here involved. By its terms it had application to counties having a population of three hundred thousand or more according to the last or any subsequent federal census. The Court there undertook to apply the principle which we have stated above. The act was held to be general, although it then applied only to

> Jefferson County. We quote from that opinion as follows: 'The wisdom of the law and the necessity for its enactment and the classification adopted were addressed to the lawmaking body. It may be well said, this body understood and appreciated the necessity of furnishing protection to the people in the matter legislated upon in the act, in the larger and more populous counties of the state, which was not necessary or practicable in the smaller counties.'
>
> "We have numerous cases which bring out that application of the principle wherein it was observed that counties of large population may reasonably be supposed to be differently served in many respects than counties of smaller population and there is sometimes drawn a distinction between a classification based upon a minimum population and a classification based upon a population with both a minimum and maximum limit. The case of *State ex rel. Shirley v. Lutz*, 226 Ala. 497, 147 So. 429 [1933], brings out that distinction. That case was dealing with an act regulating the business of plumbing in counties having a population of 100,000 or more according to the last or any subsequent federal census. The Court emphasized the different principles applicable when there is only a minimum but not a maximum number. When there is only a minimum, the Court thought a more liberal application of the principle should be made.
>
> ". . . .
>
> "*In the Opinion of the Justices*, 249 Ala. 511, 31 So.2d 721, we were responding to a legislative inquiry as to a proposed act applicable to counties of 400,000 population or more according to the last or any subsequent federal census,

> which would require the payment to such counties of a license tax of one cent on each gallon of gasoline. We thought there was a reasonable relation of the subject matter of the Act to counties of such population because we thought that in large counties the load of traffic on the highways by reason of such population justified the legislature in providing additional income in order to take care of its effect."

It is clear from the terms of Act No. 406 that its purpose was to provide more populous counties with a source of revenue by authorizing them to impose a privilege or license tax. The record establishes, if common sense does not, that needs and demands for services made upon county governments keep pace with urbanization and increases in population, necessitating new opportunities for revenue. It follows that populous counties experience greater demands for costly services than those sparsely populated. In this case, therefore, the requisite relationship was established. *Peddycoart, supra.*

Is Act No. 406 unconstitutional under § 105, Constitution of 1901?

Plaintiffs maintain that Act No. 406 is unconstitutional under Section 105, Constitution of 1901. The pertinent part of that section states that "[n]o special, private, or local law . . . shall be enacted in any case which is provided for by a general law." Plaintiffs reason that Act No. 406 is infirm under that provision because of the prior enactment of Article I, Chapter 20, Title 51, Code of 1940, now Article II, Chapter 12, Title 40, Code of 1975, which provides:

> "Every person, firm, company, corporation or association, receiver or trustee, but not a governmental subdivision, engaged in any business, vocation, occupation, calling or profession herein enumerated or who shall exercise any privilege hereinafter described for which a license or privilege tax is required shall first procure a state license, and a county license when so required, and shall pay for the same or shall pay for the exercise of such privilege the amounts hereinafter provided, and comply with all other provisions of this title."

Section 40-12-40, Code of 1975.

Act No. 406, as we have stated, is a general law, not a local law; thus Section 105 is inapplicable.

III.

Finally, plaintiffs contend that Act No. 406 fails for want of an express provision therein for the collection of an occupational tax. Plaintiffs argue further that a reading of Act No. 406 to so provide would violate Section 104(15) of the Constitution of 1901, which prohibits the enactment of a local law "[r]egulating either the assessment or collection of taxes."

For the reasons previously discussed, Act No. 406 is a general, not a local law; hence, this provision, Section 104(15), is inapplicable. And, as the trial court found:

> "The Courts have long held that there is a distinction between the terms 'assessment' and 'levy' and held that 'assessment,' as used in Subdivision (15), relates to property taxes rather than privilege taxes. *Opinion of the Justices,* 266

Ala. 363, 369, 96 So.2d 634 (1957) (quoting *Standard Oil Co. v. Limestone County*, 220 Ala. 231, 234-235, 124 So. 523 (1929)."

Moreover, the grant of authority to "levy a license or privilege tax upon any person" in § 4 of Act No. 406 was in itself authority to collect such a tax. Cf., *Syracuse Trust Co. v. Board of Supervisors*, 13 N.Y.S.2d 390 (Sup.Ct.), *affirmed*, 258 A.D. 17, 15 N.Y.S.2d 920 (1939); to "levy" is to "collect" a tax. *Black's Law Dictionary* (5th ed. 1979) at 816.

Let the judgment be affirmed.

Affirmed.

TORBERT, C.J., and MADDOX, JONES, ALMON, SHORES and ADAMS, JJ., concur.

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 1994-95

1930255

Jefferson County and the Birmingham-Jefferson Civic Center Authority

v.

Jason Richards, et al.

Appeal from Jefferson Circuit Court (CV-92-3191)

(Filed March 31, 1995)

ALMON, JUSTICE.

This appeal by permission is from the denial of a summary judgment in a declaratory judgment action brought on behalf of two classes of taxpayers against Jefferson County. The taxpayers sought to have Act 406, 1967 Ala. Acts, and Jefferson County Ordinance 1120, adopted in 1987, declared unconstitutional. Act 406 authorizes the Jefferson County Commission to levy a county occupational tax on all persons who earn wages in the County and who are not required to pay the state

business license tax. Ordinance 1120 levies the county occupational tax at the rate of .005 (1/2 of 1%) on all eligible income earned in the county, exempting persons who pay the state business license tax and domestic servants employed in private homes. The complaint was filed by two classes of taxpayers: the "Foley-Dykes" class, which represents all Federal employees subject to the tax, and the "Richards-Hill" class, which represents all non-Federal employees subject to the tax. The complaint alleges that Act 406 and Ordinance 1120 violate the equal protection and due process provisions of the Federal and State constitutions, and, with regard to the class of Federal employees only, the Buck Act, 4 U.S.C. § 111 et seq. The plaintiffs allege that the Act and the ordinance are made unconstitutional by what they call the arbitrary and irrational character of the exemptions. The Birmingham-Jefferson Civic Center Authority ("BJCC") was allowed to intervene, asserting as its interest $10 million per year of occupational tax proceeds that have been pledged to the BJCC for a 20-year period to repay BJCC special tax bonds that are now outstanding in the principal amount of over $123 million.

The County moved for a summary judgment, contending that all of the claims, except for the Federal employees' Buck Act claim, are barred by the doctrine of *res judicata*, based on the action that was the subject of this Court's opinion in *Bedingfield v. Jefferson County*, 527 So. 2d 1270 (Ala. 1988). The trial court entered a summary judgment for the County on all State constitutional claims, but denied the motion for summary judgment with regard to the Federal constitutional and statutory claims, stating:

> "In *Bedingfield v. Jefferson County*, 527 So. 2d 1270 (Ala. 1988), neither the trial court nor the Alabama Supreme Court determined whether Alabama Act No. 406 (Alabama Legislature 1967), authorizing the tax in question, or Jefferson County Ordinance No. 1120 (Jefferson County Commission 1987), imposing the tax in question, violates the equal protection clause of the United States Constitution by creating an unreasonable, unjust and improper classification of citizens subject to the tax, while exempting certain citizens from said tax in an arbitrary, irrational and unjust manner."

Pursuant to Rule 5, Ala. R. App. we granted the County permission to appeal the denial of the summary judgment. The issue before us is whether the trial court correctly held that the Federal constitutional claims are not barred by the doctrine of *res judicata* and thus correctly denied the summary judgment on these claims.

The doctrine of *res judicata* is a well-established principle of law:

> "The elements of *res judicata*, or claim preclusion, are (1) a prior judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) with substantial identity of the parties, and (4) with the same cause of action presented in both suits. *Hughes v. Allenstein*, 514 So. 2d 858, 860 (Ala. 1987)."

Dairyland Insurance Co. v. Jackson, 566 So. 2d 723, 725 (Ala. 1990).

> "If those four elements are present, any claim that was or could have been adjudicated in the prior action is barred from further litigation."

Id.; Crutcher v. Wynn, 591 So. 2d 453, 454 (Ala. 1991); *Ex parte McCracken*, 576 So. 2d 664, 665 (Ala. 1991); *Wood v. Tricon Metals & Services, Inc.*, 548 So. 2d 138, 140 (Ala. 1989); *Trimble v. Bramco Products, Inc.*, 351 So. 2d 1357 (Ala. 1977).

> "In general a judgment is res judicata not only as to all matters litigated and decided by it, but as to all relevant issues which could have been but were not raised and litigated in the suit."

Heiser v. Woodruff, 327 U.S. 726, 735 (1946) (citations omitted).

The appeal in *Bedingfield* arose from two complaints that were consolidated in a single action. One complaint was filed by Hoyt Bedingfield, Jr., individually as a taxpayer, and also in his capacity as acting director of finance of the City of Birmingham, and by the City of Birmingham. The Bedingfield/Birmingham complaint requested a judgment declaring

> "that Ordinance No. 1120 adopted by the Jefferson County Commission is void or invalid, and if necessary, that Act No. 406 passed by the Alabama Legislature in 1967 and approved by the Governor on September 7, 1967, is void and invalid to the extent that it supports any comprehensive occupational tax on all persons working in Jefferson County."

Among the grounds alleged in that complaint were that "Act 406 is a violation of the equal protection requirements and provisions of the federal and state constitution," and that "Act 406 is vague and ambiguous and

therefore is a violation of the due process requirements of the state and federal constitution."

The second complaint sought declaratory and injunctive relief "against the action of the Jefferson County Commission levying an occupational tax on employees of Jefferson County." It was filed by three persons "in their individual capacity" as "employees within Jefferson County." In addition to several other allegations of violations of due process and equal protection principles, the complaint alleged that the tax

> "constitutes a denial of equal protection in violation of the Fourteenth Amendment of the United States Constitution. *Said Act exempts professional occupations required by State law to be licensed but does not exempt other professional and nonprofessional occupations.*"

(Emphasis added.) This allegation is the substance of the allegations made in the complaint now before the Court.

The complaint that is the subject of this appeal asks the circuit court to "declare the occupational tax unconstitutional, as depriving plaintiffs of due process of law and equal protection of the laws" guaranteed under the United States and Alabama Constitutions. The same cause of action was presented in both actions. Both were actions for declaratory judgments challenging the constitutionality of the Jefferson County occupational tax. Both complaints alleged violations of the equal protection and due process provisions of the State and Federal constitutions. The appellate briefs in *Bedingfield* argued an equal protection issue regarding the fact that Act No. 406 applied only to counties with a population of 500,000 or more. *Bedingfield* was decided, both by the circuit court

and by this Court, on other State constitutional grounds, but the Federal and State equal protection and due process claims were pleaded, and it is at least true that they "could have been adjudicated." *Dairyland Ins. Co. v. Jackson*, 566 So. 2d 723, 725 (Ala. 1990). Furthermore, they arguably *were* adjudicated, because they were grounds stated as a basis for relief, and a final judgment denying relief was affirmed.

"*Res judicata* applies not only to the precise legal theory presented in the prior case, but to all legal theories and claims arising out of the same nucleus of operative fact." *NAACP v. Hunt*, 891 F. 2d 1555, 1561 (11th Cir. 1990) (citations omitted).

> " '[A] party . . . is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds on which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible.' *Baltimore Steamship Company v. Vernon Philips*, 274 U.S. 316 [47 S.Ct. 600, 71 L.Ed.2d 1069] (1926)."

Century 21 Preferred Properties, Inc. v. Alabama Real Estate Comm'n, 401 So. 2d 764, 768 (Ala. 1981) (per Jones, J., with three Justices concurring and two Justices concurring in the result).

The only other element of *res judicata* that is at issue is "substantial identity of the parties," *see Dairyland, supra*.

> "The second set of persons to whom *res judicata* applies is composed of those persons who are or were in privity with the parties to the original

> suit. . . . Privity is defined as 'a relationship between one who is a party of record and a nonparty that is sufficiently close so a judgment for or against the party should bind or protect the nonparty.' . . . Privity exists where the nonparty's interests were represented adequately by the party in the original suit. . . . Privity also exists where a party to the original suit is 'so closely aligned to a nonparty's interest as to be his virtual representative.' *United Merchants & Mfrs., Inc. v. Sanders*, 508 So. 2d 689, 692 (Ala. 1987)."

NAACP v. Hunt, supra, at 1560-61 (citations omitted). *See also Century 21, supra*. The taxpayers in the *Bedingfield* action adequately represented the interests of the taxpayers here, and the respective taxpayers' interests are not only closely aligned – they are essentially identical. The "substantial identity of the parties" element of *res judicata* is met here.

The wisdom of disallowing successive attacks on the county tax on grounds that could have been pursued and adjudicated in the initial challenge is demonstrated by the BJCC's motion to intervene, which recites that it issued two series of bonds in 1989 to expand and improve the civic center. The motion continues:

> "[P]ursuant to that certain Pledge and Appropriation Agreement between the Defendant Jefferson County and the Intervenor, said Defendant appropriated, pledged and agreed to pay a portion of the proceeds of the Occupational Tax [at] issue in this matter to the BJCC for repayment of the Series 1989 and Series 1989B Capital Outlay Special Tax Bonds issued by the BJCC in twenty (20) annual payments of $10,000,000.00

> beginning in the year 1989 and ending in the year 2008."

In 1989, the county and the Authority, in pledging the occupational tax revenue and issuing the bonds, could have relied on *Bedingfield* as authoritatively establishing that the county occupational tax was not unconstitutional for the reasons asserted by the *Bedingfield* plaintiffs. To allow a challenge now that was pleaded and could have been adjudicated in *Bedingfield* would not only violate the *res judicata* principles discussed above, but would also improperly interfere with the operations of the county and the BJCC and undermine the security of the bonds, to the detriment of the bondholders.

For the foregoing reasons, we conclude that the circuit court incorrectly held that *Bedingfield v. Jefferson County*, 527 So. 2d 1270 (Ala. 1988). did not, by the operation of the doctrine of *res judicata*, bar this action.

REVERSED AND REMANDED.

Shores, Kennedy, Cook, and Butts,* JJ., concur.

Maddox, J., dissents.

Jefferson County and the Birmingham-Jefferson Civic Center Authority v. Jason Richards, et al.

MADDOX, JUSTICE (dissenting).

The elements of the doctrine of res judicata have been precisely set out by this Court in *Wheeler v. First*

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* Although Justice Butts was not a member of this Court when this case was orally argued, he has listened to the tape of oral argument and has studied the record.

Alabama Bank of Birmingham, 364 So. 2d 1190, 1199 (Ala. 1978), where this Court said:

> "The elements of res judicata are as follows: (1) prior judgment rendered by court of competent jurisdiction; (2) prior judgment rendered on the merits; (3) parties to both suits substantially identical; and (4) same cause of action present in both suits."

See also *Dominey v. Mathison*, 292 Ala. 293, 293 So. 2d 472 (1974), and my dissenting opinion in *Century 21 Preferred Properties, Inc. v. Alabama Real Estate Comm'n*, 401 So.2d 764, 770 (Ala. 1981). Even a cursory examination of this doctrine as applied to the facts of this case reveals that it has no application to this case. In this dissent, I will make a brief statement of the facts and will state the principle of law I think should be applied to sustain the trial court's order.

The majority holds that these plaintiffs are bound by the judgment rendered in *Bedingfield v. Jefferson County*, 527 So. 2d 1270 (Ala. 1988), where the City of Birmingham challenged the constitutionality of Act No. 406 and the validity of a county ordinance establishing an occupational tax.

The trial judge, in denying the defendant's motion for a summary judgment in this case (that motion being based on the ground that the action was barred by the doctrine of *res judicata*), issued an order in which he concluded, in part, that "[i]n *Bedingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988), neither the trial court nor [this Court] determined whether Act No. 406 (Alabama Legislature 1967), authorizing the tax in question, or Jefferson County Ordinance No. 1120 (Jefferson

County Commission 1987), imposing the tax in question, violates the equal protection clause of the United States Constitution by creating an unreasonable, unjust and improper classification of citizens subject to the tax, while exempting certain citizens from said tax in an arbitrary, irrational and unjust manner." The trial judge also determined that "[i]n *Bedingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988), neither the trial court nor [this Court] determined whether the tax in question violates the Buck Act (4 U.S.C. § 111) as it pertains to federal employees." I agree with the trial court on both points.

In concluding that the trial judge was correct, I have examined the pleadings in *Bedingfield* and the order entered by the trial judge in that case and I have studied the opinion issued by this Court in *Bedingfield*, a case in which I participated. I have also carefully considered the argument of Jefferson County that "the claims in this case arise from the same nucleus of operative fact as the claims made in *Bedingfield* and [that] because the evidence necessary to support both claims is *identical*, it is axiomatic that the fourth element of *res judicata* is satisfied," and I have given careful consideration to the views of my colleagues expressed in the majority opinion, and my only comment is that if the "same cause of action presented in both suits" element of the *res judicata* doctrine is so easily satisfied, then it could be extended *ad infinitum* and would establish a precedent that could close the courthouse doors to other plaintiffs in other cases who might find themselves faced with the rule of law herein established. I think that the Court is establishing a bad precedent.

My opinion that *Bedingfield* does not bar the claims presented in this case is the same as that of the trial judge: that this Court, in *Bedingfield*, did not adjudicate these claims, or any claim similar to them. The West Publishing Company synopsis in *Bedingfield* succinctly states what that case was about, and the issues it adjudicated:

> "City challenged constitutionality of county ordinance establishing occupational tax. The Circuit Court, Jefferson County, Braxton L. Kittrell, Jr., J., upheld ordinance, and appeal was taken. The Supreme Court, Beatty, J., held that: (1) statute authorized county to levy occupational tax; (2) statute was general, rather than local legislation; and (3) statute authorizing levy of tax provided for collection of such tax."

527 So. 2d at 1270. Where in the *Bedingfield* opinion is there an adjudication of the federal constitutional claims the plaintiffs raise in the instant action? Neither the order of the trial judge nor the opinion of this Court contains a single reference to whether the Act and the county ordinance violate any provision of the Federal Constitution.

It is true that the plaintiffs, in *Bedingfield*, did allege in their complaint that "[i]f Ordinance No. 1120 were authorized by Act 406, then Act 406 is unconstitutional based upon any one of the following grounds:. . . . B. Act 406 is a violation of the equal protection requirements and provisions of the federal and state constitutions." But I ask this question: Is the mere making of such an allegation in a complaint sufficient to satisfy the "same cause of action presented in both suits" element of the *res judicata* doctrine? I think not, especially when the adjudicatory

orders of the trial court, and of this Court, affirmatively show that the issues in *Bedingfield* involved whether Act No. 406 was a general law or was a local law because the Act was applicable only to counties with a population of 500,000 or more.

But even assuming that the federal equal protection claim was presented and adjudicated in *Bedingfield*, the plaintiffs in this case are attacking the *exemption scheme* contained in. Ordinance 1120, which exempts a number of occupations from the occupational tax.[1] Clearly, that claim was not presented or adjudicated in *Bedingfield*.

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[1] Ordinance 1120 taxes the gross receipts of any person who engages in or follows any "vocation, occupation, calling and profession," but exempts from its definition of "vocation, occupation, calling and profession" the following: utility companies; freight lines and equipment companies; electric companies; gas companies; railroads; telephone companies; telegraph companies; express companies; financial institutions; insurance companies; abstract companies; acetylene gas and carbide manufacturers; adding machine, calculating machine, and comptometer businesses; advertising companies; air conditioning plant and equipment businesses; amusement parks; architects; attorneys; auctioneers; automobile dealers; automobile accessory dealers; automobile garages and shops; automobile storage garages; tire retreading shops; barbers; baseball parks; battery shops; beauty parlors; bicycle and motorcycle dealers; blueprint makers; bond makers; bottlers; bowling alleys; iron, railway supply, furnace supply, and mining supply brokers and agents; broom, brush, and mop manufacturers; cereal and soft drink retailers and wholesalers; certified public accountants; cigar, cigarette, and cheroot retailers and wholesalers; circus operators; cleaning and pressing establishments; coal and coke dealers; coffin and casket manufacturers, dealers, and agents; collection agencies; commission merchants or merchandise brokers; concert and musical entertainers; persons

Jefferson County and BJCC argue that even if the plaintiffs' claims were not previously raised or

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engaged in discounting notes, mortgages, and conditional sales contracts; construction companies or contractors; cotton buyers; cotton compress operators; millers; persons operating cotton warehouses; credit agency personnel; persons operating creosoting businesses; delicatessen shops; dentists; detectives; film developers and printers; directory printers; refrigerator dealers; embalmers; engineers; domestic servants employed in private homes; owners and operators of fertilizer factories; damaged and close out goods salesmen; fireworks dealers; fortunetellers; palmists, clairvoyants, astrologers, phrenologists and crystal gazers; fruit dealers; gasoline station and pump operators; glass salesmen; golf course operators; hat cleaners; fur dealers; horse, rodeo, and dog and pony show operators; horse and mule dealers; ice cream manufacturers; innkeepers; junk dealers; launderers; sleight-of-hand artists; lighting rod installers; lumber dealers and jobbers; lumberyard operators; machinery repair shops; manicurists; hairdressers; upholsterers; doctors, chemists, bacteriologists, and roentgenologists; persons engaged in the photocopy business; miners; monument and tombstone sellers; motion picture operators; oculists, optometrists, and opticians; osteopaths and chiropractors; operators of packing houses and cold storage plants; pawnbrokers; peddlers and itinerant vendors; photographers; musical instrument salesmen; pig iron storage operators; pistol and knife dealers; playing card salesmen; plumbers, steamfitters and tin shop operators; operators of pool halls, owners of racetracks and athletic fields; radio salesmen; real estate brokers and agents; restaurant, cafe, and cafeteria operators; operators of roadhouses, nightclubs, and public dance halls; sandwich shops, barbecue stands, hamburger and hot dog stands; sawmills; scientists, naturopaths and chiropodists; sewing machine salesmen; shooting gallery operators; shotgun and rifle dealers; skating rink operators; soliciting brokers; stock and bond brokers; street fair and carnival operators; syrup and sugar factory operators; theater, vaudeville, and variety show operators; ticket scalpers; tourist camp operators; tractor, road machinery,

adjudicated in the *Bedingfield* case, the claims are barred, nevertheless, because "any claim that was or could have been adjudicated in the prior action is barred from further litigation." *Dairyland Insurance Co. v. Jackson*, 566 So. 2d 723, 725 (Ala. 1990). Stated differently, the County and BJCC contend that the theory on which the plaintiffs bring this action could have been asserted in the *Bedingfield* case and that this action is therefore due to be dismissed.

The test for determining whether two cases involve substantially the same cause of action is whether the same evidence would support a recovery in both actions. *Barber v. Fields*, 624 So. 2d 532, 536 (Ala. 1993); *Vaughan v. Barr*, 600 So. 2d 994, 996 (Ala. 1992); *Waters v. Jolly*, 582 So. 2d 1048, 1053 (Ala. 1991); *Garris v. South Alabama Production Credit Ass'n*, 537 So. 2d 911, 914 (Ala. 1989); *Dominex, Inc. v. Key*, 456 So. 2d 1047, 1054-55 (Ala. 1984); *Wheeler v. First Alabama Bank of Birmingham*, 364 So. 2d 1190, 1200 (Ala. 1978). In *Barber v. Fields*, this Court reversed a summary judgment entered on *res judicata* grounds where both the former and the latter cases involved the city water service but the claims in the latter case, which pertained to the removal of water meters, was not litigated in the former case, which involved a claim that the

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and trailer dealers; trading stamp merchants; freight carriers; transient dealers, vendors, and peddlers; turpentine stillers; vending machine operators; veterinarians; warehouse operators; wax factory operators and waste grease and animal by-product purchasers and receivers. See Ordinance 1120, § 1(B) and § 2; §§ 40-12-40 through 40-12-180, § 40-12-50, §§ 40-12-52 through 40-12-55, §§ 40-12-57 through 40-12-60, § 40-16-6, and § 27-4-9, Ala. Code 1975.

city's refusal to extend water service to the plaintiff's land was a violation of her right to equal protection of the laws. Barber, 624 So. 2d at 536. In *Vaughan v. Barr*, this Court reversed a judgment entered on *res judicata* grounds where both the former case and the latter case involved the same land and landowners but the former case, which involved a boundary dispute, was "based on different theories" and "require[d] different evidence" from that required in the latter case, which involved a claim of an easement by necessity. *Vaughan*, 600 So. 2d at 996.

Although this case and the *Bedingfield* case involve Act 406 and Ordinance 1120, the similarity there ends, because the evidence necessary to prove the claims asserted in this case, and the legal arguments in support of those claims, will be very different from those in *Bedingfield*. Here, the plaintiffs allege that the exemptions to the tax violate their equal protection rights under the Federal Constitution. The Federal employees are permitted to maintain their Buck Act claims. How are their claims different from those of the non-Federal employees who claim equal protection violations? In each case, the plaintiffs apparently are citizens of the United States who are claiming protection of their rights under Federal constitutional and statutory provisions. The foundation of their claims, the Federal Constitution, is the same.

I have carefully examined the arguments of Jefferson County and those of BJCC, and I recognize the importance of this case to those entities, but I think the law is against them. The plaintiffs' claims in this case are just different from those presented in *Bedingfield*, and the evidence necessary to prove their claims will be very

different from the evidence used to prove the claims asserted in *Bedingfield*. In fact, the issues presented in *Bedingfield* were largely legal issues relating to the classification between counties of 500,000 or more in population and counties of less than 500,000 in population and to the question of whether Act 406 violated the Alabama Constitution, and there is no mention in *Bedingfield* of any Federal constitutional claims adjudicated in either the trial court or this Court.

Based on the foregoing, I believe that the fourth element of the doctrine of *res judicata* as set forth in *Dairyland Insurance Co. v. Jackson*, 566 So. 2d 723, 725 (Ala. 1990) ("the same cause of action presented in both suits"), is not present in this case; I believe that the trial judge correct [sic] concluded that the plaintiffs could maintain their action.

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

JASON RICHARDS and FANNIE HILL, individually and on behalf of all employees of the United States of America, who are subject to the Jefferson County, Alabama occupational tax which is more particularly described by this complaint; and GEORGE DAVID DYKES and JOAN FOLEY DYKES, individually and on behalf of all employees of the United States who are subject to the Jefferson County, Alabama occupational tax which is more particularly described by this complaint;	CIVIL ACTION NO. CV-92-03191
PLAINTIFFS,	
VS.	
JEFFERSON COUNTY, a political subdivision of the State of Alabama, and RANDY GODEKE, individually and in his official capacity as Director of the Department of Revenue for Jefferson County, Alabama, and as successor in office to C. H. Ritchie, former Director of the Department of Revenue for Jefferson County, Alabama	
DEFENDANTS.	

ORDER

(Filed Apr. 9, 1993)

After a consideration of the law, statutes, legal evidence and argument of counsel for the parties the Court finds that Defendant is entitled to summary judgment as to certain claims raised by the Plaintiffs due to the doctrine of res judicata, but that certain of Plaintiffs' claims should not be dismissed. The Court FINDS as follows:

1. In *Beddingfield* [sic] *v. Jefferson County*, 527 So.2d 1270 (Ala. 1988), neither the trial court nor the Alabama Supreme Court determined whether Alabama Act No. 406 (Alabama Legislature 1967), authorizing the tax in question, or Jefferson County Ordinance No. 1120 (Jefferson County Commission 1987], imposing the tax in question, violates the equal protection clause of the United States Constitution by creating an unreasonable, unjust and improper classification of citizens subject to the tax, while exempting certain citizens from said tax in an arbitrary, irrational and unjust manner.

2. In *Beddingfield* [sic] *v. Jefferson County*, 527 So.2d 1270 (Ala. 1988), neither the trial court nor the Alabama Supreme Court determined whether the tax in question violates the Buck Act (4 U.S.C. § 111) as it pertains to federal employees.

3. The trial court in *Beddingfield* [sic] *v. Jefferson County*, 527 So.2d 1270 (Ala. 1988), did in fact consider the constitutionality of Alabama Act No. 406 and Jefferson County Ordinance No. 1120 as it relates to the *Constitution of Alabama* of 1901 and found "nothing" in said Act to be "repugnant" to such a degree as to invalidate the Act, and further did not find Ordinance No. 1120 to be

"invalid". (*Order* of Judge Braxton Kittrell, Specially Sitting, CV-87-504-465 and CV-87-504-469, Jefferson County, Alabama, December 11, 1987.)

Thus the state constitutional issues in this matter have been previously adjudicated.

Accordingly, Summary Judgment is GRANTED in favor of Defendant, and against Plaintiffs as to Counts Three and Four of the Complaint based on the doctrine of res judicata. Summary Judgment is DENIED as to Counts One and Two.

Done and Ordered this 8th day of April, 1993.

/s/ John E. Rochester
JOHN E. ROCHESTER
CIRCUIT JUDGE
SPECIALLY SITTING

Floyd PEDDYCOART et al., Mrs. Peggy J. Salamone, etc., Robert Lee McKinnon, Sr., etc., Roger Dale Crocker and Richard Lambert et al.

v.

CITY OF BIRMINGHAM.

S.C. 2552, S.C. 2662, S.C. 2731, S.C. 2356 and S.C. 2729.

Supreme Court of Alabama.

Jan. 13, 1978.

Rehearing Denied Feb. 10, 1978.

Five plaintiffs filed separate tort actions against city. The Circuit Court, Jefferson County, Thomas E. Huey, Jr., and Josh Mullins, JJ., granted city's motions to dismiss actions based upon governmental immunity under statute and plaintiffs appealed. Appeals were consolidated. The Supreme Court, Beatty, J., held that: (1) the statute granting governmental immunity only to the largest city in the largest county in the state is unconstitutional under both the Federal and the State Constitutions; it violates the equal protection principle and, because of its unreasonable population classification, it cannot qualify as a general law of local application, and (2) population classification cannot be utilized in the future to avoid the definition of a local act, and henceforth, when at its enactment legislation is local in its application it will be a local act and subject to all of the constitutional qualifications applicable to it.

Reversed and remanded.

Torbert, C. J., concurred specially and filed opinion.

Bloodworth, J., concurred in part, dissented in part and filed opinion.

W. Eugene Rutledge of Rutledge, Williams, Williams & Norton, Anniston, for appellants Mrs. Peggy J. Salamone, who sues in her capacity as the mother of Michael A. Salamone, a 17-year old minor child, Robert Lee McKinnon, Sr., as Administrator of the Estate of Robert Lee McKinnon, Jr., deceased, and amicus curiae, Peggy J. Salamone as appellant in the case of Mrs. Peggy J. Salamone, who sues in her capacity as the mother of Michael A. Salamone, deceased, a 17-year old minor child v. The City of Birmingham, (appellee).

Mike W. McCormick, Birmingham, for appellant Roger Dale Crocker.

Roger M. Monroe of Jones & Monroe, Birmingham, for appellants Richard Lambert et al., and Floyd Peddycoart et al.

Milford G. Bass, Jr., Birmingham, for City of Birmingham, appellee.

BEATTY, Justice.

This is a consolidated appeal by five plaintiffs who filed tort actions against the City of Birmingham. In each case the trial court granted a motion to dismiss based upon a plea of governmental immunity under Tit. 62, § 660, *Alabama Code* (Recomp. 1958):

> The city shall not be liable in damages for personal injuries or damage to personal property by reason of any act or omission done or

> omitted in the exercise of its governmental functions or failure to exercise such functions; provided, however, that this provision shall not be construed to prohibit or limit the recovery of damages for personal injuries arising out of defects in highways as now provided or allowed by law.

The plaintiffs have placed in issue the constitutionality of that statute under both the state and federal Constitutions. It is contended that § 660 is a local Act notwithstanding the fact that in its original form, Act 257, § 13, Acts of Alabama, Regular Session 1915, it bore a minimum population classification of 100,000. The plaintiffs argue that this section is constitutionally offensive under § 106 of the Alabama Constitution of 1901 because the population classification is not reasonably related to the purpose of the section, and because it permits an unequal application of the law.

Our cases have held that such a relationship must exist between the statute's purpose and the population classification established, otherwise the classification will be deemed arbitrary, *e.g., Dearborn v. Johnson*, 234 Ala. 84, 173 So. 864 (1937). The case of *Couch v. Rodgers*, 253 Ala. 533, 45 So.2d 699 (1950) reviews many of our decisions on this point, in some of which we reasoned that the circumstance of size did bear a reasonable relationship to the purpose of the legislation. But we are unable to ascertain in this case such a relation. The purpose of § 660 is to provide governmental immunity, but that immunity is to be granted only to the largest city in the largest county in the state. If there is any reasonable relationship between the grant of immunity and the size of its population as

denoted by its corporate boundaries, we are unable to perceive it. "Judicial ingenuity would exhaust itself in an effort to find any rational basis for the classification it presents." *City of Birmingham v. Moore*, 248 Ala. 422, 425, 27 So.2d 869, 872 (1946). Such a classification, moreover, arbitrarily denies to citizens the right to pursue against that city remedies for injuries to person and property resulting from the exercise of its governmental functions, while they are free to pursue those same remedies against all others, as we shall show later. This results in a denial of equal protection of the laws, United States Constitution, Article Fourteen, because it constitutes an irrational difference in the treatment of our citizens. *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961); *accord, Comer v. City of Mobile*, 337 So.2d 742 (Ala., 1976).

We hold, therefore, that § 660 is unconstitutional under both the federal and state constitutions. It violates the equal protection principle and, because of its unreasonable population classification, it cannot qualify as a general law of local application.

It is also maintained that § 660 violates the provisions of Article 4, § 105, Alabama Constitution of 1901, in view of the earlier enactment of what is now Tit. 37, §§ 502-504, *Alabama Code* (now § 11-47-190-192, *Code of Ala.* 1975);

> No city or town shall be liable for damages for injury done to or wrong suffered by any person or corporation, unless said injury or wrong was done or suffered through the neglect, carelessness, or unskillfulness of some agent, officer or employe[e] of the municipality engaged in work therefor and while acting in the line of his duty, or unless the said injury or

wrong was done or suffered through the neglect, carelessness or failure to remedy some defect in the streets, alleys, public ways, or buildings after the same had been called to the attention of the council or other governing body or after the same had existed for such unreasonable length of time as to raise a presumption of knowledge of such defect on the part of the council or other governing body and whenever the city or town shall be made liable to an action for damages by reason of the unauthorized or wrongful acts, or the negligence, carelessness or unskillfulness of any person or corporation, then such person or corporation shall be liable to an action on the same account by the party so injured.

Article 4, § 105, Alabama Constitution of 1901 mandates that:

> [N]o . . . local law, . . . shall be enacted in any case which is provided for by a general law, . . . nor shall the legislature indirectly enact any . . . local law by the partial repeal of a general law.
>
> The Alabama Constitution, § 110, defines a general law as one "which applies to the whole state," and a local law as one "which applies to any political subdivision or subdivisions . . . less than the whole; . . . "

If the interpretation of § 105 were being addressed presently for the first time it would be less onerous to give a literal meaning to the language used. We are faced with a more difficult task, however, in view of the numerous instances in the past in which this Court has approved local enactments on subjects already covered

by general acts, *e.g., Dudley v. Birmingham Ry., Light & Power Co.*, 139 Ala. 453, 36 So. 700 (1903); *Brandon v. Askew*, 172 Ala. 160, 54 So. 605, 607 (1911); *Board of Revenue v. Kayser*, 205 Ala. 289, 88 So. 19 (1921); *Mathis v. State*, 280 Ala. 16, 189 So.2d 564 (1966); *Dunn v. Dean*, 196 Ala. 486, 71 So. 709 (1955); *State ex rel. Jones v. Steele*, 263 Ala. 16, 81 So.2d 542 (1955); *Malone v. State*, 46 Ala.App. 363, 242 So.2d 409 (1970).

With conscious regard to the doctrine of *stare decisis et non quieta movere*, nevertheless our duty is to apply the highest law in our state as conscientiously as our abilities allow, even though this application runs counter to reasons which heretofore have been espoused for opposite views. In so doing we perform only our judicial function and do not encroach upon the separation of powers doctrine which makes the legislative branch supreme in legislative matters. Indeed, in performing that duty we only re-assert the axiom of the supremacy of our organic law over all branches of government. *State Docks Commission v. State ex rel. Cummings*, 227 Ala. 414, 150 So. 345 (1933). If we entertained any doubt upon the meaning of § 105, we would, of course, accord a weighty consideration to the legislative interpretation which has been manifested through the years by the passage of numerous local laws on subjects already affecting those localities through general laws. *Jansen v. State ex rel. Downing*, 273 Ala. 166, 137 So.2d 47 (1962). But the fact that a class of statutes has been in existence for a long time and considered constitutional does not prevent this Court from declaring them unconstitutional. *Sadler v. Langham*, 34 Ala. 311 (1859). If a legislative act is repugnant to the Constitution, the courts not only have the power, but it is their duty, when the

issue is properly presented, to declare it so. *State ex rel. Bassett v. Nelson*, 210 Ala. 663, 98 So. 715 (1924); *Dyer v. Tuskaloosa Bridge Co.*, 2 Port. 296, 27 Am.Dec. 655 (1835).

The only phrase in the pertinent portion of § 105 requiring construction is "provided for." "Provided" ordinarily signifies a condition, or a limitation, qualification, or a restraint or exception. *Stanley v. Colt*, 5 Wall. 119, 72 U.S. 119, 18 L.Ed. 502 (1886), and, in context, it may mean "of the same import." *Webster's Third International Dictionary* (G. & C. Meriam Co., 1971); *Webster's New Collegiate Dictionary* (G. & C. Meriam Co., 1973); Abbott, *Dictionary of Terms and Phrases* (Little, Brown & Co., 1879). When we see the phrase "provided for" preceded by the words "No . . . local law," we are bound to consider the phrase as one of restraint and limitation pertaining to matters of the same import dealt with in the general law. Section 105, then, is an additional constitutional proscription upon the type or kind of legislation which the legislature is allowed to enact, following as it does § 104 which also contains limitations upon the legislative power. Nothing in either section prohibits all local legislation, see §§ 106 and 107, but only that prohibited by §§ 104 and 105.

Notwithstanding the unclouded language expressed in § 105, nevertheless it has prompted a large amount of litigation, beginning as early as 1903 and continuing as late as 1976. *Dudley v. Birmingham Ry., Light & Power Co.*, 139 Ala. 453, 36 So. 700 (1903); *Parrish v. Stembridge*, 337 So.2d 754 (Ala. 1976). Historically this Court has felt it necessary to construe this language, apparently to assure that the separation of powers doctrine would not be

inhibited and that the legislative branch of state government would continue to be supreme in legislative matters. *State ex rel. Wilkinson v. Lane*, 181 Ala. 646, 62 So. 31 (1913). Thus this Court in an early case held that § 105 was intended:

> [T]o prohibit the enactment of special, private, or local laws to meet the purposes of particular cases which may be accomplished by proceedings outside of the Legislature under the provisions of general statutes enacted to meet all cases of that general character. . . . *Brandon v. Askew*, 172 Ala. 160, 54 So. 605, 607 (1911).

This explanation has been utilized in other cases, *e.g., Dunn v. Dean*, 196 Ala. 486, 495, 71 So. 709 (1914); *Walker County v. Barnett*, 247 Ala. 418, 24 So.2d 665 (1946).

Another construction was placed upon § 105 in *Board of Revenue v. Kayser*, 205 Ala. 289, 88 So. 19 (1921). In that case this Court referred to the Proceedings of the Constitutional Convention, p. 114, for an explanation by one of the commentators:

> 'Now is there any hardship [in] saying to any man, any individual, corporation or association, that if the laws of the state have already provided for your case and you can get everything you could possibly get by appealing to the Legislature, you ought not to consume the public time in trying to get the Legislature to do what has already been done for you. That is all this provision means.' . . .

Those proceedings have been recognized, of course, as proper aids in constitutional construction. *City of Montgomery v. Graham*, 255 Ala. 685, 53 So.2d 363 (1951). The

import of the explanation, however, was that § 105 was designed simply to prevent duplication in legislative enactments. This reasoning was followed in *State ex rel. Brandon v. Prince*, 199 Ala. 444, 74 So. 939 (1917) which resulted from a change in the general law regarding the selection of jurors by legislating a different procedure for Tuscaloosa County. Our Court observed:

> If we should hold that, merely because there is a general law providing for the selecting and drawing of juries for the several counties, none of its provisions can be changed by a local law, it would be tantamount to holding that a local law cannot be passed upon that subject. We do not think that this is the meaning of section 105 of the Constitution, nor that such was the intent of the Constitution framers in ordaining it.

From this recognition favoring local laws enacted on the same *subject* of the general law, it was a short judicial step to the present explanation:

> If, in the judgment of the Legislature, local needs demand additional or supplemental laws substantially different from the general law, the Legislature has power to so enact. Courts are charged with the duty to determine whether there is a substantial difference between the general and the local law, but cannot invade the legislative domain to determine whether a county should have a local law substantially different and in addition to the state law. . . . *Standard Oil Co. of Kentucky v. Limestone County*, 220 Ala. 231, 235, 124 So. 523, 526 (1929).

To summarize, this Court has interpreted § 105 in at least three different ways: (1) It was intended to prevent

local laws whose purposes might be accomplished outside the legislature; (2) It was intended to prevent duplication in legislative enactments; and (3) It was not intended to prevent the enactment of a local law on a subject already covered by a general law, when the local law is substantially different from the general law.

These differences present more than a mere play on words. If the facts in *State ex rel. Brandon v. Prince, supra,* are used as an example, the legislature changed the manner of statewide jury selection by establishing a different procedure in Tuscaloosa County. While the subject-matter of jury selection was already covered by general law, it might also be said that the different procedures established by the local law created a substantial difference between the local and general laws. Likewise, in *Standard Oil Co. v. Limestone County, supra,* the legislature authorized one county to impose a gallonage tax on gasoline sales even though there was already in existence a statewide gallonage tax. That Court found that this local tax was not "the same tax" (and thus there was a substantial difference), however, it cannot be reasonably maintained that the two laws did not concern the same subject matter because each provided for a gallonage tax on gasoline sales. In neither case was duplication present because there was a substantial difference between the two due to the effect of the local law. Indeed, it may be stated that every case involving a change in a general law by a local legislative act creates a "difference" which some could describe as "substantial," and that "substantial difference" might in any case justify the conclusion, therefore, that the local law does not concern the same subject matter.

Being a limitation upon legislative authority, § 105 clearly means just the opposite of what the Court in *State ex rel. Brandon v. Prince, supra,* held that it meant. In the quotation we have noted earlier, that Court placed more emphasis upon the efficacy of local laws, and less upon that of general laws, than § 105 obviously intended to give them, for the Court stated "[i]f we should hold that, *merely* because there is a general law. . . . " 199 Ala. at 447, 74 So. at 941 (emphasis added). We do not look upon the presence of a general law upon a given subject as a bare segment, but to the contrary, its presence is *primary,* and means that a local law cannot be passed upon that subject. *By constitutional definition a general law is one which applies to the whole state and to each county in the state with the same force as though it had been a valid local law from inception. Its passage is none the less based upon local considerations simply because it has a statewide application, and already having that effect, the constitutional framers have prohibited the enactment of a local act when the subject is already subsumed by the general statute.*

Thus, in this case, the legislature had already enacted a statute of statewide application on the general subject of municipal immunity for torts. Title 37, §§ 502-504, making municipalities liable in tort, was originally enacted as a general law in 1907. Judicial limitation of its application was eliminated by judicial decision on July 10, 1975 when this Court overruled prior decisions construing the legislation to prohibit suits against cities when engaged in a governmental function. *Jackson v. City of Florence,* 294 Ala. 592, 320 So.2d 68 (1975). Following the enactment of this statewide statute dealing with the subject of municipal liability in tort, the precursor of the

present § 660, *i.e.,* Act 257, § 13 Acts of Alabama, Regular Session 1915, became law. That Act dealt with a subject of the same import as the 1907 Act, that is, the subject of municipal liability in tort. To be sure, in its original form it was limited to cities with populations of one hundred thousand or more according to the Federal Census. Acts bearing such population classifications in the past have been classified as statewide Acts of local application, on the theory that they would automatically apply in the future to additional territorial subdivisions as their population increased. *Masters v. Pruce,* 290 Ala. 56, 67, 274 So.2d 33 (1973) contains a list of cases involving such legislation and in which this Court held that those laws were constitutional. Even though the entire law was enacted as a statewide act of local application, clearly it was intended to apply to Birmingham (whose population we judicially know to have been 132,685 in 1910 and 178, 806 in 1920, *U.S. Bureau of the Census,* 1970, Vol. I, *Characteristics of the Population,* Part A, Sec. 1, Table 28, p. 116), and, according to Tit. 62, § 1, *Alabama Code* of 1940 (Recomp. 1958) is one applying to less than the whole state.

But the defendant insists that any objection to the character of § 660 has been resolved by subsequent legislative action and judicial opinion thereon. Specifically, we are referred to the adoption of Title 62 (including § 660) as a part of the entire *Code* of 1940 which was adopted by the legislature in a single act. In *Jenkins v. State,* 245 Ala. 159, 16 So.2d 314 (1944) this Court held that "the Code as a whole provides a system of law applicable to the [whole] state," and in *Burns v. State,* 246 Ala. 135, 19 So.2d 450, 453 (1944) this Court reiterated that conclusion by

observing "that when the Act was passed by the legislature, adopting the Code of 1940 in its entirety, a general law was enacted." Under this blanket of general statewide application of what originally were local laws, of course, we would not presently declare that § 660, or any other acts existing at that time are deficient under § 105 of the Alabama Constitution of 1901, however questionable they now appear to be. Indeed, legislation of local application adopted after these decisions may have been in response, at least in part, to such court approval.

However, we must take particular note of the fact that the body of local acts present in the *Alabama Code* of 1940 (Recomp. 1958) and enacted since that Code's original enactment were not adopted by the legislature when it enacted the *Code of Alabama* 1975. See Tables, Vol. 2, *Code of Ala.* 1975. This action removed from the statewide influence of the Code of 1940 any legislation which may follow the enactment of the Code of 1975 and which is local legislation by constitutional definition.

Therefore we respectfully direct the legislature's attention to the fact that § 110 of the Alabama Constitution mandates the definition of a local law. It is one "which applies to any political subdivision or subdivisions of the state *less than the whole*; . . . " (emphasis added). Applies when? Obviously, when it becomes law! If, when it becomes law it applies only to a subdivision of the state, it is a local law. That is the clear meaning of the language employed by our constitutional framers. In the face of this plain language, to conclude that the application of a law to less than the entire state makes no difference when a futuristic population classification is employed is to engage in sophistic reasoning. We reject

such reasoning in favor of the clear definition of a local act which is contained in the Constitution. A population classification cannot be utilized in the future to avoid the definition of a local act.

We are mindful of prior decisions which have approved enactments based upon population classifications when the classifications were found to be "substantial" where not "arbitrarily" fixed, and were based upon a "reasonable necessity" for the several classifications. *E. g., Dearborn v. Johnson*, 234 Ala. 84, 173 So. 864 (1937). No citation of authority is necessary to demonstrate the elusive nature of such a judicial test, or to point out that a number of these cases might have been decided either way. The specificity of the constitutional framers manifested by §§ 104, 105 and 110 discloses their intent, and negates tolerance with any such tests which give to both courts and legislature such wide discretion. Henceforth when at its enactment legislation is local in its application it will be a local act and subject to all of the constitutional qualifications applicable to it. With regard to legislation heretofore enacted, the validity of which is challenged, this Court will apply the rules which it has heretofore applied in similar cases.

With deference to those members of this Court who in the past have been concerned that such a construction would impinge upon the legislative power to enact local legislation, we must observe that such is not the case. As we have shown, our Constitution authorizes local legislation, and sets out a procedure for its enactment. Under that authorization local legislation reflecting responses to local needs may be enacted. It is only when those local

needs already have been responded to by general legislation that § 105 of our state Constitution prohibits special treatment by local law.

Because the trial court erred in granting the defendant's motions to dismiss the plaintiffs' complaints, these cases must be reversed and remanded.

REVERSED AND REMANDED.

TORBERT, C.J., concurring specially.

MADDOX, FAULKNER, JONES, ALMON, SHORES and EMBRY, JJ., concur.

BLOODWORTH, J., concurring in part, dissenting in part.

TORBERT, Chief Justice (concurring specially):

I concur in the result based upon the denial of equal protection under the law as to these plaintiffs.

As I understand the majority in its interpretation of §§ 105 and 110 of the Constitution as applied to the issues in these cases, this decision will have prospective application. That is, with respect to statutes heretofore enacted by the Legislature their constitutionality would be measured by those *elusive standards* heretofore set forth in the many decisions of this court over the past seventy years. The principle of prospective application is not of recent vintage, but was recognized by this court as early as 1890. *Farrior v. New England Mortgage Security Co.*, 92 Ala. 176, 9 So. 532 (1890). The rule of *stare decisis* is founded upon the principle of conservatism but was never intended to prevent progress in the science of the law. Neither does the rule disregard the importance or necessity of correct

determinations of the law, nor require its perpetuated subversion.

The Legislature is now in its last regular session of the members' term of office. In order to accord that body the effect of the principle of *stare decisis* as they represent the people in legislative matters it would seem preferable to make this decision effective upon the conclusion of this regular session. This would allow time for that body to publicly advertise for passage of local legislation where permissible, undertake a careful study as to the effect of this decision, and embark on its legislative process at the beginning of its first regular session at the next term of the Legislature under this settled construction of our Constitution.

The constitutional issue as to whether any general law of local application based upon population is a local law under § 110 of the Constitution is clearly presented. That issue is now decided, and the law henceforth should be well settled. However, further judicial refinement and interpretations in other cases may well be necessary with respect to the application of § 105 prohibiting the Legislature from enacting local laws where the subject matter has been "provided for by a general law."

BLOODWORTH, Justice (concurring in part, dissenting in part.)

I concur only in so much of the Court's opinion which holds that § 660, Tit. 62, Code of 1940, is unconstitutional because it violates the equal protection clause of both the federal and state constitutions. This is as much as the Court needs to say, and as far as the Court needs to go, to decide this case, in my judgment.

Thus, I cannot join the Court in the remainder of its decision, and I respectfully dissent therefrom. For over 70 years this Court has been committed to the proposition of upholding general acts of local application. *Parrish v. Stembridge*, 337 So.2d 754 (Ala. 1976); *Standard Oil Co. of Kentucky v. Limestone County*, 220 Ala. 231, 124 So. 523 (1929); *State ex rel. Crenshaw et al. v. Joseph et al.*, 175 Ala. 579, 57 So. 942 (1911); *Griffin v. Drennen et al.*, 145 Ala. 128, 40 So. 1016 (1905). I think it unwise, at this time, to depart from such settled construction.

Supreme Court, U.S.
FILED
OCT 23 1995
OFFICE OF THE CLERK

No. 95-386 (3)

IN THE

Supreme Court Of The United States

OCTOBER TERM 1995

JASON RICHARDS and FANNIE HILL,

Petitioners,

v.

JEFFERSON COUNTY, ALABAMA
and BIRMINGHAM-JEFFERSON CIVIC
CENTER AUTHORITY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

RULE 15.6 REPLY

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4 pp

RULE 15.6 REPLY

By our reading of Rule 15.6, this reply is allowed to address "arguments first raised in the brief in opposition." In Jefferson County's brief in opposition it gets carried away and surprisingly contends: "What Petitioners have falsely described as an 'exemption scheme' is actually a division of taxing authority between the State and the County." (Jefferson County's Brief of Respondent in Opposition, pp. 22-23) Justice Maddox of the Alabama Supreme Court, in his dissent, efficiently answers this odd new argument (which we believe is based upon Jefferson County's concern that this Court will find this case to be virtually identical to its own exemption scheme decisions cited in the Petition) as follows:

> "In concluding that the trial judge was correct, I have examined the pleadings in *Bedingfield* and the order entered by the trial judge in that case and I have studied the opinion issued by this Court in *Bedingfield,* a case in which I participated. I have also carefully considered the argument of Jefferson County that 'the claims in this case arise from the same nucleus of operative fact as the claims made in *Bedingfield* and [that] because the evidence necessary to support both claims is identical, it is axiomatic that the fourth element of *res judicata* is satisfied, and I have given careful consideration to the views of my colleagues expressed in the majority opinion, and my only comment is that if the 'same cause of action presented in both suits' element of the res judicata doctrine is so easily satisfied, then it could be extended ad infinitum and would establish a precedent that could close the courthouse doors to other plaintiffs in other cases who might find themselves faced with the rule of law herein established. I think that the Court is establishing a bad precedent.

> My opinion that *Bedingfield* does not bar the claims presented in this case is the same as that of the trial judge: that this Court, in *Bedingfield*, did not adjudicate these claims, or any claims similar to them.
>
> . . .
>
> But even assuming that the federal equal protection claim was presented and adjudicated in *Bedingfield*, the plaintiffs in this case are attacking the exemption scheme contained in Ordinance No. 1120, which exempts a number of occupations from the occupational tax."
>
> —Appendix to Petition, pp. A-9 through A-11

Jefferson County also surprises the undersigned with a new argument that: "Petitioners are raising the issue of privity for the first time before this Court." (Jefferson County's Brief of Respondent in Opposition, p. 14" This is simply not so. In our complaint we cited *Bedingfield* twice (Appendix to Petition, pp. A-29, A-31) and distinguished it ("the occupational tax has been previously challenged in this court on non-federal and other state law grounds") from this action by showing that the *Bedingfield* case did not address or decide the fact that "[t]he array of persons subject to the occupational tax, when compared with the array of persons exempted from the tax, and the concomitant disparity in taxes paid by and between occupations in Jefferson County, Alabama which falls within and without the burden of the occupational tax, render it irrational, unduly burdensome, and violative of the equal protection clause and the due process clause of the Fourteenth Amendment to the Constitution of the United States." (Appendix to Petition, pp. A-27, A-28) Hence, our reliance upon *Martin v. Wilks*, 490 U.S. 755 (1989), for our contention that these petitioners, who were neither designated as parties nor made parties by service of process in *Bedingfield*, nor

members of a class (*Bedingfield* was not a class action) cannot fairly be bound by that judgment. Indeed, prongs three and four of the Alabama Supreme Court's res judicata analysis in this case addressed privity ("with substantial identify of the parties") and action identity ("with the same cause of action presented in both suits") adversely to petitioners for the first time in this litigation. Those erroneous analyses, and the constitutional deprivations which are their consequence, constitute the two-chambered heart of this appeal.

Respectfully submitted,

/s/ William J. Baxley
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/s/ Joel E. Dillard
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(4)

Supreme Court, U.S.
FILED
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NO. 95-386

IN THE

Supreme Court Of The United States

OCTOBER TERM 1995

JASON RICHARDS and FANNIE HILL,
Petitioners,

v.

JEFFERSON COUNTY, ALABAMA
and BIRMINGHAM-JEFFERSON CIVIC
CENTER AUTHORITY,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of Alabama

---

BIRMINGHAM-JEFFERSON CIVIC CENTER AUTHORITY'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Due Process Clause permits *res judicata* to bar the re-litigation of taxpayers' constitutional claims that were, or could have been, raised in prior litigation when the same claims are raised in subsequent litigation by taxpayers who, although not parties to the prior litigation, share an identity of interest with the taxpayers in the prior litigation and attempt to prosecute the same cause of action.

2. Whether the Equal Protection Clause permits the Alabama Legislature to authorize Jefferson County to impose an occupational or license tax on those businesses, and only those businesses, not already required to pay such a tax under state law.

CERTIFICATE OF INTERESTED PERSONS

Counsel for Defendant/ Respondent	Edwin A. Strickland Jeffrey M. Sewell Charles S. Wagner
Counsel for Intervenor/ Respondent	Charlie D. Waldrep Thomas L. Stewart Mary H. Thompson William M. Slaughter Robert D. Shattuck, Jr. Richard H. Walston
Counsel for Petitioners	William J. Baxley Joel E. Dillard
Respondents	Jefferson County, Alabama Birmingham-Jefferson Civic Center Authority
Petitioners	Jason Richards Fannie Hill A putative class of taxpayers
Trial Judge	Honorable John Rochester
Supreme Court of Alabama	Honorable Ernest C. Hornsby Honorable Hugh Maddox Honorable Reneau Almon Honorable Janie Shores Honorable J. Gorman Houston Honorable Mark Kennedy Honorable Kenneth Ingram Honorable Ralph Cook Honorable Terry Butts

No other persons are known to have participated directly or indirectly in the appeal of this matter.

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No. 95-386

In The

Supreme Court Of The United States

October Term, 1995

JASON RICHARDS and FANNIE HILL,

Petitioners,

v.

JEFFERSON COUNTY, ALABAMA and BIRMINGHAM-JEFFERSON CIVIC CENTER AUTHORITY,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of Alabama

---

BIRMINGHAM-JEFFERSON CIVIC CENTER AUTHORITY'S BRIEF IN OPPOSITION

STATEMENT

As explained in the Statement of the Case set forth in the brief of Respondent Jefferson County, Alabama (the "County"), the instant suit was brought as a class action challenging the validity of an occupation tax levied by the County pursuant to its Ordinance 1120 ("Ordinance

1120"), which was adopted by the County in the exercise of the taxing authority conferred upon the County by Act 406, enacted at the 1967 Regular Session of the Legislature of Alabama ("Act 406"). The Birmingham-Jefferson Civic Center Authority (the "Authority") is a public corporation organized under the constitution and laws of Alabama for the purpose of owning and operating a civic center complex that serves the County and the City of Birmingham.

In a cooperative financing effort for the expansion and improvement of the Authority's civic center complex, the City of Birmingham pledged $3,000,000 per year for 20 years and the County pledged $10,000,000 per year for 20 years to provide a composite source of payment for two series of the Authority's bonds that were issued in 1989. These series of bonds were initially issued in the aggregate amount of $132,380,000 and remain outstanding in the amount of $114,630,000. The moneys pledged by the County for the debt service on the Authority's bonds are to be derived solely from the proceeds of the occupation tax challenged in the instant case, and since the bonds are limited obligations payable solely from the moneys pledged by the County and the City, their source of payment would be legally destroyed if the County's occupation tax is determined to be constitutionally invalid. The Authority's bonds were issued in 1989 after, and in reliance upon, the judgment of the Supreme Court of Alabama in *Bedingfield v. Jefferson County*, 527 So. 2d 1270 (Ala. 1988), which upheld the validity of the occupation tax in a suit by citizens and taxpayers whose cause of action was the same as that now sought to be relitigated by the Petitioners in the instant case.[1] Because

[1]The Authority does not contend that the challenge to the occupation tax by the class of federal employees under the Buck Act, 4 U.S.C. § 111, was or could have been raised in *Bedingfield*.

of the foregoing circumstances and the vital interest of the Authority in upholding the validity of the occupation tax that is the sole source of payment for its bonds, the Authority was allowed to intervene as a defendant in this case.

The Authority, as a Respondent in this case by reason of its status as Defendant-Intervenor below, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the decision of the Alabama Supreme Court in this case.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Petition Is Due to Be Denied in Accordance with Supreme Court Rule 14.5.

> The failure of a Petitioner to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the Petition.

Rule 14.5, Rules of the United States Supreme Court.

A. The Petition is too carelessly drafted to justify the Court's attention.

Implicit in Rule 14.5 is the proposition that the Court will deny a petition for certiorari that is so poorly drafted as to cast serious doubt on the petitioner's willingness or ability to articulate a defined, properly tailored issue and to support its position ably and persuasively. Here, it is evident that the Petition was not the subject of careful consideration or thoughtful attention. Otherwise, the Petition would not: refer to the Supreme "Couty" of Alabama on its cover; ignore the admonition in Rule 14.1(a) that the questions presented "should not be argumenta-

tive;" cite the wrong statute (28 U.S.C. § 1254 instead of § 1257) to invoke the jurisdiction of this Court; or disregard the requirements of Rule 14.1(h) (discussed *infra*). Such carelessness casts serious doubt as to whether the Petitioner ought to be allowed to further occupy this Court's time.

B. The first question sought to be presented is incoherent.

The first question presented by the Petitioners purports to raise an issue involving due process and equal protection. However, the ostensibly pertinent portion of the Petitioner's argument is bereft of any mention of either due process or equal protection. Instead, it inexplicably addresses itself to this Court's decision in *Martin v. Wilks*, 490 U.S. 755 (1989). The problem is that the Court did not rely on due process considerations in deciding *Martin v. Wilks*.[2] *Martin v. Wilks* addressed the validity of the so-called "impermissible collateral attack" doctrine. The outcome was governed by the Court's interpretation of Rules 19 and 24, Fed. R. Civ. P.; due process was not an element of the Court's rationale. There is simply no evident connection between the first question purportedly presented and the Petitioners' discussion of *Martin v. Wilks*. The Court, along with the County and the Authority, is left to speculate as to what issue the Petitioners are attempting to raise.

II. The Questions Presented Were Not Addressed or Decided in the Courts Below.

This Court has often referred to, and overwhelmingly followed, its ordinary practice of declining to review issues not addressed, decided or involved in the lower court's consideration of the case. *E.g., Youakim v. Miller,*

[2]Nor did the Court rely on an analysis of *res judicata*. *See infra* at n.4 and accompanying text.

425 U.S. 231, 234 (1976); *Delta Airlines v. August,* 450 U.S. 346, 362 (1981). It is true that the Court, in exceptional cases, has exercised its discretion to address issues not raised in the courts below. It is also true, however, that the Petitioners have not proposed any justification for this Court to deviate from its customary and consistent practice of declining to consider issues neither addressed nor decided by the courts below. Because neither question presented was addressed, decided, or involved in the decisions below, the Petitioners cannot now claim the attention of this Court.

Whatever interpretation this Court assigns to the first question presented by the Petitioners, it is clear that no remotely comparable issue was raised or addressed below. In the court below, the Petitioners never argued that the foreclosure of their claims would violate due process or would be contrary to this Court's holding in *Martin v. Wilks*.

The Petitioners direct their second question presented to the constitutional validity of the occupational tax that is the subject of their complaint. Ironically, the Petitioners went to great pains below to stress that the merits of their equal protection claim were *not* before the Alabama Supreme Court. As is clear from the opinions below, neither the trial court nor the Alabama Supreme Court addressed, much less decided, the merits of the Petitioners' equal protection claim.[3] The only issue reached by either of the courts below was whether the Petitioners' substantive claims were barred under the doctrine of *res judicata*.

[3]Although a court can certainly dispose of claims or issues *sub silentio*, a tacit ruling on substantive issues cannot be inferred when a court holds that the substantive claims raised are barred by *res judicata*.

The Petitioners' failure to raise, in the courts below, either of the questions presented is underscored by their failure to comply with Rule 14.1(h) of the Supreme Court Rules. The Petitioners' statement of the case does not contain any suggestion as to "the stage of proceedings [in the lower courts] at which the federal questions sought to be reviewed were raised," or "the method or manner of raising them and the way in which they were passed upon by those courts," or the "pertinent quotation of specific portions of the record" in which either issue was addressed below.

III. The Decision Below Is Not in Conflict With *Martin v. Wilks*

In order for one decision to be in conflict with another, it is necessary that the two decisions address the same or analogous issues. The lower court's application of *res judicata* cannot conflict with *Martin v. Wilks* because the latter decision was not concerned with *res judicata*. *Martin v. Wilks* involved a challenge by white males to the City of Birmingham's implementation of race- and sex-conscious relief pursuant to a consent decree entered in earlier litigation. The white male plaintiffs were not parties to either the earlier litigation or the consent decree, nor were their interests represented by any such party, making *res judicata* inapplicable. 490 U.S. at 761. Instead, the issue was the validity of the "impermissible collateral attack" doctrine, under which some courts had foreclosed non-party challenges — denominated "collateral attacks" — to court-approved consent decrees under several rationales, none of which involved *res judicata*. In fact, in rejecting the impermissible collateral attack rule,[4]

[4]The Court grounded its decision on two rationales, neither of which implicated due process or *res judicata*. First, the Court interpreted Rules 19 and 24, Fed. R. Civ. P, to conclude that unrepresented non-parties were not obliged to intervene upon pain of subsequent preclusion of their claims. 490 U.S. at 763-65. Second, the Court observed that a voluntary settlement — even one resulting in the entry of a court-approved consent decree — could never extinguish the rights or claims of those not party to the settlement, even if they were parties in the litigation. *Id.* at 768. In other words, *res judicata* was not at issue in *Martin v. Wilks* because the prerequisite of a court-imposed (rather than court-approved) final judgment was not satisfied.

the Court expressly recognized and reaffirmed that a judgment can conclude the rights of non-parties whose interests have been "adequately represented by someone with the same interests who is a party." 490 U.S. at 762 n. 2. Accordingly, to the extent *Martin v. Wilks* applies to this case, it supports the conclusion of the court below.

IV. The Lower Court Properly Applied the Well-Established Principles of *Res Judicata*.

In its brief in opposition, Respondent Jefferson County, Alabama, demonstrates that the holding of the court below is entirely consistent with the state and federal jurisprudence of *res judicata*. To avoid duplication, this Respondent will confine itself to stressing two points. First, "[t]he question of whether a party's interests in a case are virtually representative of the interests of a nonparty is one of fact for the trial court." *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 719-20 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975). The trial court's finding that the Petitioners' interests were represented by the *Bedingfield* plaintiffs was expressly upheld by the Alabama Supreme Court: "The taxpayers in the *Bedingfield* action adequately represented the interests of the taxpayers here, and the respective taxpayers' interests are not only closely aligned — they are essentially identical. The substantial identity of the parties' element of *res judicata* is met here." The

Petitioners offer no reason for this Court to revisit that factual determination.

Second, under the view of this case urged by the Petitioners, the constitutionality of a statute could never be conclusively determined so long as an attorney with his eye on the public purse could find new plaintiffs and new arguments with which to dress up a constitutional challenge that had not succeeded in earlier attempts. State and local governments, as well as their private and corporate citizens, must be able to rely on the courts' decisions concerning the constitutionality and lawfulness of the various statutes governing their affairs. Without a policy of finality, the specter of perpetually re-litigating previously decided statutory and constitutional issues — along with the potential economic catastrophe of reversal — will paralyze the operation of government and public finance. Moreover, repeated challenges to the constitutionality of a statute will result in a needless waste of the courts' time and of the limited resources of public bodies obliged to fend off the interminable challenge of opportunistic litigation.

The doctrine of *res judicata* exists precisely to avoid such debilitating uncertainty by providing finality and repose. *Res judicata* depends for its usefulness and effectiveness upon the recognition (i) that real parties, each with a genuine interest in the controversy, must be trusted with the responsibility of presenting the legal issues to be decided and (ii) that the resulting decision will bind persons who, although not being parties to the litigation, have substantially the same interests as the actual parties insofar as the relevant facts and legal issues are concerned and have a cause of action that is substantially the same as that of the actual parties. If the actual parties have had the full opportunity guaranteed by due process of law to litigate relevant constitutional issues, the results of that litigation must be binding on all other persons

whose interests are so aligned with the actual parties as to be adequately represented.

Moreover, the applicability of *res judicata* cannot be defeated by complaining that the parties to the earlier action — those who had the actual opportunity to litigate on behalf of all similarly situated persons — somehow failed to make the most of their opportunity. The plaintiffs in *Bedingfield* all raised the issue of the validity of the County's occupation tax under the Fourteenth Amendment of the United States Constitution in their respective complaints and in various briefs, but they evidently failed to persuade the Alabama Supreme Court that the issue was sufficiently substantial to warrant discussion. A judgment must be regarded as finally deciding all issues pleaded, even though the judicial opinion fails to address explicitly the disposition of such issue. *Grubb v. Pub. Util. Comm'n of Ohio,* 281 U.S. 470, 477-78 (1930); *Poston v. Gaddis,* 372 So. 2d 1099, 1101 (Ala. 1979). Even if the *Bedingfield* plaintiffs pursued the Fourteenth Amendment argument so unpersuasively as to cause both the trial court and the Alabama Supreme Court to leave it unmentioned, they nevertheless made it an element of their case, and the final decision in *Bedingfield* must be *res judicata* with respect to other taxpayers of Jefferson County who are animated by a subsequent urge to relitigate the same issue.

V. The Petitioners' Equal Protection Claims Do Not Present a Close or Unsettled Question Meriting the Court's Attention.

This Court has many times addressed the equal protection implications of state or local taxing decisions. Over 35 years ago, this Court enunciated principles directly applicable to this case:

> The applicable principles have been often stated and are entirely familiar. . . . The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value.

Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 525 (1959) (citations omitted). The Court went on to note that "it has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts *reasonably can be conceived* that would sustain it." *Id.* at 528 (citations omitted, emphasis added).

The Court has subsequently emphasized the extraordinary latitude granted state government in matters of taxation:

> In taxation, even more than in other fields, legislatures possess the greatest freedom in classification. There is a presumption of constitutionality which can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. . . . The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.

Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973) (citations and internal quotation marks omitted).

The Petitioners attempt to engage the sympathy of this Court by claiming that the County, in Ordinance 1120, has concocted a "cockamamie" exemption scheme that exempts a "bizarre collection" of potential taxpayers from the occupation tax. That characterization presents a distorted and misleading picture of the license tax laws

of Alabama and the legislatively mandated conformity of Ordinance 1120 to those laws. When the interaction of Alabama's general license tax laws, Act 406 and Ordinance 1120 is correctly perceived, it is easy to understand why the Supreme Court of Alabama considered the equal protection validity of the occupation tax to be undeserving of discussion on the two occasions when that issue was before it.[5]

The businesses, occupations and professions subject to license taxation by the State of Alabama fall into two categories: (i) businesses or occupations that pay license taxes to the State that are shared with the counties; and (ii) professions licensed and regulated by an agency of the State which pay a license tax only to the State. Except as otherwise provided by specific sections of the state license code, businesses and occupations in the first category are required by § 40-12-2(c) and § 40-12-2(e) of the Code of Alabama 1975 to pay a license tax to the county that "piggy backs" on the state license requirement and is assessed at a rate equal to one-half of the state license tax. In general, each section of the state license code applicable to a learned or regulated profession imposes only a state license tax and provides explicitly that no license tax or portion thereof shall be paid to any county in the State. For example, Code of Alabama 1975, § 40-12-49 provides that "Each attorney engaged in the prac-

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[5]In *Bedingfield v. Jefferson County, supra,* the validity of the occupation tax under the Fourteenth Amendment of the United States Constitution was raised by the complaint and discussed in the briefs considered by the Alabama Supreme Court, but the issue was not discussed in the Court's opinion. The issue was certified for interlocutory appeal to the Alabama Supreme Court in this case, see Appendix 1 to this brief, but was not discussed because the *sub silentio* resolution of the issue in *Bedingfield* was deemed *res judicata.*

tice of law shall pay an annual license tax to the state, but none to the county."

Act 406 authorized the County to impose a license tax on only those businesses, occupations and professions that paid no license tax to the state. With respect to both categories of state license taxes, it is easy to discern a rational basis for the limitation imposed by the Alabama Legislature. For both categories, the taxing interest of the State is paramount; with one category, the State taxes the activity at twice the rate permitted the County, and with the other category, it retains the entire tax benefit from licensing the activity. By restricting the County to taxing businesses, occupations and professions that were not already taxed by the State, the Legislature asserted the State's interest in protecting the revenue source provided by the pre-existing state license and occupation taxes.

With respect to the learned and regulated professions that pay only a state license tax, the State has an additional interest in protecting them from taxation by the County. The practice of these professions in accordance with standards prescribed by regulatory agencies of the State is essential for the common welfare. The levy of license taxes is part of the State regulatory system applicable to these professions. As Chief Justice Marshall observed in *McCulloch v. Maryland,* 17 U.S. 316, 431 (1819), "the power to tax involves the power to destroy."

Not wishing to be concerned as to whether the County would use a taxing power over regulated professions in a careful and nonabusive manner, the Alabama Legislature in Act 406 simply denied the County the right to tax the learned professions that are taxed exclusively by the State under a licensing arrangement that is part of the State's regulatory system. In adopting Ordinance 1120, the County followed exactly the mandate of the Legislature in Act 406 by uniformly levying the tax on every occupa-

tion that was not excluded from the taxing authority of that act.[6]

The list of so-called "cockamamie" "exemptions" from the occupation tax recited with such righteous indignation in the Petition is nothing more than a list of all the businesses, occupations and professions upon which the Alabama Legislature had already, at various times over a period of more than 60 years and under various circumstances, seen fit to impose business license taxes.[7] Prior to the enactment of Act 406 and Ordinance 1120, all of the "exempted" taxpayers listed by the Petitioners were, in fact, the only taxpayers who paid business or occupation license taxes of any kind in the County. If the idea had occurred to willing counsel, such as those who have initiated this litigation, those taxpayers could have brought the mirror image of this case — an equal protection attack on a putative "exemption scheme" that exempted the very taxpayers now sought to be included in the Petitioners' class.

When any privilege or license tax is levied on any particular business or profession without being imposed on other and different businesses or professions, the businesses or professions left untaxed are "exempted" in the sense that they escape taxation. That kind of exemption, however, does not violate equal protection by discriminating among similarly situated persons who pursue the same business or profession and whose competitive standing would be affected by an uneven tax burden.

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[6]Domestic workers in private homes were exempted under the authority of *Estes v. City of Gadsden,* 266 Ala. 166, 94 So. 2d 744 (1957).

[7]Act 406 does not contain a list of "exempted" occupations by name, as might be erroneously inferred from the Petition. Rather, it defines the occupations covered in the grant of taxing authority as those not already required to pay a license or privilege tax under certain specified statutes.

Rather, it is the kind of exemption that simply reflects a legislative judgment to tax one category of business or professional activity while not taxing others. So long as the tax is not so burdensome as to threaten the economic viability of the taxpayer, or deliberately punitive, or lacking any rational relationship to any legitimate governmental purpose, state legislatures have traditionally been accorded broad discretion under the Fourteenth Amendment to tax the privilege of conducting certain businesses or professions while leaving others unburdened. *See Allied Stores v. Bowers, supra.*

That was, in fact, the case with the citizens of Jefferson County before imposition of the occupation tax pursuant to Act 406 and Ordinance 1120. Physicians, lawyers, engineers and other learned professions, as well as various categories of businesses that had become subject to state business licenses at various times during the evolution of the state's economy, were required to pay license taxes, but other individuals pursuing various occupations and businesses were free from any state or county license tax. In other words, by simply not taxing every business, occupation and profession, the state had arguably created an "exemption scheme" that is logically comparable to the "exemption scheme" which the Petitioners now claim to have been unconstitutionally implemented by Ordinance 1120. Those who belong to the class of citizens now represented by the Petitioners are the beneficiaries of this first "exemption scheme" because they had no license tax burden prior to the adoption of Ordinance 1120. Now that the Petitioners and those they represent have become subject to a license tax — which, in some cases, is levied at a greater rate than the older state-county license taxes — they contend that the taxpayers who previously bore the sole burden of state-county license taxation are the beneficiaries of a new unconstitutional "exemption scheme."

There is clearly no substance to any claim based on this notion of an "exemption scheme." Such a claim amounts to nothing more than an attack on the decision of the Alabama Legislature, in the exercise of its legitimate taxing power, not to levy a uniform license tax at all times on all businesses, occupations and professions. The Petitioners are arguing that if any business, occupation or profession is required to pay a license tax, then all businesses, occupations and professions must be subject to substantially the same license tax. That principle constitutes a novel and dangerous intrusion of substantive equal protection into the taxing power of the state legislature — an intrusion much beyond what has been traditionally deemed appropriate to protect similarly situated persons from discriminatory taxation.

CONCLUSION

Based on the foregoing, the Authority submits that the Petition for Writ of Certiorari is due to be denied on any of several independent grounds.

Respectfully submitted,

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IN THE CIRCUIT COURT FOR JEFFERSON COUNTY

APPENDIX

TENTH JUDICIAL CIRCUIT, ALABAMA

JASON RICHARDS, et al.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO.
	)	CV 92-3191
JEFFERSON COUNTY, et al.,	)	
	)	
Defendant.	)	
	)	
v.	)	
	)	
BIRMINGHAM-JEFFERSON CIVIC CENTER AUTHORITY,	)	
	)	
Intervenor.	)	

ORDER

This case came on for hearing on Defendants' and Intervenor's REQUEST FOR CERTIFICATION TO APPEAL INTERLOCUTORY ORDER. Defendants Jefferson County and the Birmingham-Jefferson Civic Center Authority urge the Court to certify as appealable under Rule 5, Alabama Rules of Appellate Procedure, that portion of its ORDER of November 17, 1993, denying summary judgment for Defendants on Count 1 and Count 2 of Plaintiff's Complaint. Defendants' summary judgment motion maintained that all four counts of the Complaint, except that portion of Count 1 asserting federal employees' Buck Act (4 U.S.C. § 111) claims, are barred by *res judicata* based upon the decision of the Supreme Court in *Bedingfield v. Jefferson County,* 527 So.2d 1270 (1988). The ORDER granted summary judgment as to Counts 3 and 4 based on the doctrine of *res judicata.* The remain-

ing Count 1 asserts federal employes' Buck Act claims and federal constitutional claims. The remaining Count 2 asserts non-federal employees' federal constitutional claims.

In support of the REQUEST FOR CERTIFICATION to appeal under Rule 5, the parties have informed the Court and the Court hereby finds the following with respect to the Rule 5 requirements.

The Jefferson County occupational tax at issue in this case generates approximately $36,000,000 per year. Ten million dollars of the annual proceeds are pledged for a twenty year period to pay the main component of debt service on bonds of the Birmingham-Jefferson Civic Center authority (the "Civic Center Authority") that are now outstanding in the principal amount of $123,205,000 (the City of Birmingham has pledged $3,000,000 per year to pay the remaining debt service on these bonds).

With respect to class certification there are several hundred thousand putative class members who pay the County occupational tax. However, Defendants rely on employers to withhold and pay the tax and, therefore, Defendants do not have an individual identification by name and address of most of the putative class members.

WHEREFORE, upon due consideration of the foregoing; the purpose and requirements of Rule 5, Alabama Rules of Appellate Procedure; and, the arguments of counsel, it is the OPINION of the Court and the Court thereby finds that the portion of its ORDER denying summary judgment on Counts 1 and 2, except for the federal employes' Buck Act claim, should, as a matter of public interest and exigency, be and hereby is CERTIFIED as immediately appealable in accordance with Rule 5, Alabama Rules of Appellate Procedure. The Court further finds and CERTIFIES as follows:

1. Whether Plaintiffs' claims asserted in Counts 1 and 2 are also barred by the doctrine of *res judicata* is a controlling question of law as to which there is substantial ground for difference of opinion.

2. The Plaintiffs' claims asserted in Counts 1 and 2 also present a controlling question of law, as to which there is substantial ground for difference of opinion, with respect to the issue of whether Act No. 406 enacted by the Legislature of Alabama in 1967 (the statute authorizing the levy of the County's occupation tax), by its terms, denied the Plaintiffs and other citizens similarly situated the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution. Act No. 406 and the general professional licensing laws of the State of Alabama exempt certain professions and occupations from the County's occupation tax and in so doing make certain legislative classifications among the citizens of the County for purposes of levying the tax in question.

3. An immediate appeal from the interlocutory ORDER would materially advance the ultimate termination of the litigation. While the questions herein certified are on appeal, this Court expects to proceed to adjudicate the sole remaining Buck Act claim on behalf of a relatively small class of federal employees who work in the County. The parties have advised the Court that they are not aware of any factual disputes pertaining to the Buck Act claim, therefore, said claim may be decided on cross motions for summary judgment, thereby terminating the litigation in the circuit court.

4. An interlocutory appeal would avoid protracted and expensive litigation. If it is determined by the Rule 5 appeal that Counts 1 and 2 are barred either by *res judicata* or by decision of the equal protection question as a matter of law, both the Defendants and Petitioners' employers in the County would be spared the great cost

and disruption of having to identify and locate and give notice to each of the several hundred thousand class members.

DONE and ORDERED this 17th day of November, 1993.

/s/ John E. Rochester
JOHN E. ROCHESTER, Circuit Judge
Specially Sitting

pc: Edwin A. Strickland
Charles S. Wagner
Jeffrey M. Sewell
Thomas L. Stewart
William J. Baxley
Joel E. Dillard

(5)

Supreme Court, U.S.
FILED
JAN 8 1996
CLERK

No. 95-386

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1995

JASON RICHARDS and FANNIE HILL,
Petitioners,

vs.

JEFFERSON COUNTY, ALABAMA
and BIRMINGHAM-JEFFERSON CIVIC
CENTER AUTHORITY,
Respondents.

On Writ Of Certiorari To The Supreme Court Of Alabama

JOINT APPENDIX

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Petition for Certiorari Filed on September 7, 1995
Certiorari Granted on November 22, 1995

130PP

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April 21, 1992 — Plaintiffs' Complaint filed in the Circuit Court for Jefferson County, Alabama.

May 29, 1992 — Answer filed by Defendants Jefferson County and Randy Godeke.

June 4, 1992 — Motion to Intervene filed by Birmingham-Jefferson Civic Center Authority, together with Answer as Defendant.

June 4, 1992 — Motion for Summary Judgment filed by Defendants Jefferson County and Randy Godeke.

June 19, 1992 — Order of Recusal entered by original Circuit Judge, requesting appointment of a Circuit Judge from outside the Tenth Judicial Circuit (Jefferson County).

April 8, 1993 — Original Order entered by Circuit Judge, John Rochester (specially sitting because of recusal of original judge), denying Defendants' Motion for Summary Judgment as to the Plaintiffs' federal constitutional claims and granting said motion as to the Plaintiffs' state claims.

August 18, 1993 — Defendants filed Motion to Vacate Prior Order because parties did not receive timely notice of Circuit Court's order with respect to summary judgment.

August 18, 1993 — Defendants filed Request for Certification to Appeal Interlocutory Order as basis for appealing the Circuit Court's order denying Defendants'

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES (Continued)

Motion for Summary Judgment as to the Plaintiffs' federal constitutional claims.

November 17, 1993 — Circuit Court vacated original order with respect to Defendants' Motion for Summary Judgment, entered new Order denying said motion as to the Plaintiffs' federal constitutional claims and granting said motion as to Plaintiffs' state claims, and entered Order certifying questions for interlocutory appeal to Supreme Court of Alabama.

January 6, 1994 — Supreme Court of Alabama granted permission for an interlocutory appeal of the questions certified by the Circuit Court.

March 31, 1995 — Supreme Court of Alabama released its opinion and judgment.

April 14, 1995 — Plaintiffs filed Application for Rehearing before Supreme Court of Alabama.

June 9, 1995 — Application for Rehearing denied by Supreme Court of Alabama.

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

JASON RICHARDS and FANNIE HILL, individually and on behalf of all employees, excluding employees of the United States of America, who are subject to the Jefferson County, Alabama occupational tax which is more particularly described by this complaint; and GEORGE DAVID DYKES and JOAN FOLEY DYKES, individually and on behalf of all employees of the United States who are subject to the Jefferson County, Alabama occupational tax which is more particularly described by this complaint;

Plaintiffs,

vs.

JEFFERSON COUNTY, a political subdivision of the State of Alabama, and RANDY GODEKE, individually and in his official capacity as Director of the Department of Revenue for Jefferson County, Alabama, and as successor in office to C. H. Ritchie, former Director of the Department of Revenue for Jefferson County, Alabama

Defendants.[1]

COMPLAINT
Filed April 21, 1992

Plaintiffs, by and through their undersigned counsel, complain and allege as follows:

[1] All pleadings and orders contained in this Joint Appendix were originally filed in this case, except those items preceded by the caption for a different case.

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to Rule 57, Alabama Rules of Civil Procedure and 42 U.S.C. 1983, as this is a civil action arising under the laws and Constitution of the United States. This action involves a violation of federal law for which 42 U.S.C. 1983 provides a remedy, and to which Rule 57 of the Alabama Rules of Civil Procedure is applicable. A question of intergovernmental immunity arising under the Buck Act, 4 U.S.C. 101, et seq, is presented by Plaintiffs Dykes individually, and on behalf of all similarly situated federal employees. Venue lies in the Circuit Court for Jefferson County, Alabama, the tax challenged by this action being levied and collected by Jefferson County, Alabama, against and from plaintiffs, and similarly situated class members within Jefferson County, Alabama.

PARTIES

2. Plaintiff Jason Richards is a courier privately employed by a law firm in Jefferson County, Alabama, and is a resident citizen of Jefferson County, Alabama; Fannie Hill is a domestic servant privately employed in commercial buildings in Jefferson County, Alabama, and is a resident citizen of Jefferson County, Alabama; they bring this action individually on their own behalf, and in a representative capacity on behalf of all other employees in Jefferson County, Alabama, other than employees of the United States of America, who have been subject to the levy, collection and payment of taxes established by Jefferson County Ordinance 1120, commonly known as the Jefferson County Occupational Privilege Tax ("the occupational tax") since January 1, 1988. George David Dykes is a Reclamation Specialist employed by the United States of America in the Office of Surface Mining, Department of the Interior in Jefferson County, Alabama, and is a

resident citizen of Jefferson County, Alabama; Joan Foley Dykes is a Registered Nurse employed by the United States of America in the Department of Veterans' Affairs in Jefferson County, Alabama, and is a resident citizen of Jefferson County, Alabama; they bring this action individually on their own behalf, and in a representative capacity on behalf of all other employees of the United States of America, who have been subject to the levy, collection and payment of the occupational tax since January 1, 1988. Plaintiffs Jason Richards, Fannie Hill, and Joan Foley Dykes have been required by their employers to pay the occupational tax at all times relevant to these proceedings, continuously since January 1, 1988, when the occupational tax became effective. Plaintiff George David Dykes was required by his employer to pay the occupational tax for approximately one year after enactment of the occupational tax, after which he refused to continue to do so, based upon the authorities cited herein.

CLASS ACTION AVERMENTS

3. This lawsuit is brought by plaintiffs as a class action, on their own behalf and on behalf of all others similarly situated, under the provisions of Rule 23(a) and Rule 23(b)(1) of the Alabama Rules of Civil Procedure for injunctive and declaratory relief, and for an order awarding members of the plaintiff classes compensatory damages in sums equal to the amounts of taxes illegally levied, collected and paid by them, and for relief incident and subordinate thereto, including costs and attorneys fees pursuant to 42 U.S.C. 1988, and such other authorities as shall be determined applicable to this action.

4. The classes represented by plaintiffs in this action, and of which plaintiffs themselves are members, consist of all persons subject to the occupational tax, both federal and non-federal employees, who have been subject

to its levy, collection and payment since January 1, 1988, when the occupational tax became effective.

5. The exact number of members of the classes, as herein identified, is not known, but it is estimated that there are thousands of members of each class. The classes are so numerous that joinder of individual members herein is impracticable.

6. There are common questions of law and fact in the action that relate to and affect the rights of each member of the classes represented by the named plaintiffs and the relief sought is common to both classes, namely a declaration that the occupational tax is unconstitutional.

7. The claims of plaintiffs, who are representatives of the class herein are typical of the claims of the classes they represent, in that the claims of all members of the classes, including plaintiffs, depend on a showing of the unconstitutionality of the occupational tax in a manner which is beneficial to each. There is no conflict as between any individual named plaintiff and any other member of either class with respect to this action, or with respect to the relief sought herein. The Dykes Class of federal employees are beneficiaries of federal and state statutes which prohibit discrimination in a manner which is consistent with the general prohibition of discrimination applicable to the Richards/Hill Class of non-federal employees, and both classes are protected equally by the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States, and the state laws cited herein.

8. The named plaintiffs are the representative parties for their respective classes, and are able to, and will, fairly and adequately protect the interests of the classes they represent. The attorneys for plaintiffs are experienced and capable in litigation in the field of constitutional, tax and civil rights claims, and have successfully represented claimants in other litigation of this nature.

ALLEGATIONS OF FACT

9. On or about January 1, 1988, Defendant Jefferson County levied and began collecting, and Plaintiffs and the classes they represent began involuntarily paying, the occupational tax, which was described by Defendant as a "license or privilege tax on natural persons engaged in any vocation, occupation, calling or profession who are not required by law to pay any license or privilege tax to the state or county." A copy of the occupational tax ordinance is attached to this complaint, and made a part hereof as Exhibit A.

10. The occupational tax is calculated as one-half of one percent of the gross earnings of plaintiffs and members of both classes, but is characterized by Defendant as a license or privilege tax, rather than an income tax. Specifically the taxing ordinance provides:

> It shall be unlawful for any person to engage in or follow any vocation occupation, calling or profession as defined in Section 1 within the County on and after the 1st day of January, 1988, without paying license fees to the County for the privilege of engaging in or following such vocation, occupation, calling or profession, which license fees shall be measured by one-half percent (1/2%) of the gross receipts of each such person.

11. The taxing ordinance also defines gross receipts and compensation, as follows:

> The words "gross receipts" and "compensation" shall have the same meaning, and both words shall mean and include the total gross amount of all salaries, wages, commissions, bonuses or other money payment of any kind, or any other considerations having monetary value, which a person receives from or is entitled to receive from or be given credit for by his employer for

> any work done or personal services rendered in any vocation, occupation, calling or profession, including any kind of deductions before "take home" pay is received; but the words "gross receipts" and compensation shall not mean or include amounts paid to traveling salesmen or other workers as allowance or reimbursement for traveling or other expenses incurred in the business of the employer, except to the extent of the excess of such amounts over such expenses actually incurred and accounted for the by employee to the employer.

12. The occupational tax carves out of its scope, by way of its definition of "vocation, occupation, calling and profession" a substantial array of persons, as follows:

> The words "vocation, occupation, calling and profession" shall mean the doing of any kind of work, the rendering of any kind of personal services, or the holding of any kind of position or job within Jefferson County, Alabama, by any clerk, laborer, tradesman, manager, official or other employee, including any non-resident of Jefferson County who is employed by any employer as defined in this section, where the relationship between the individual performing the services and the person for whom such services are rendered is, as to those, services, the legal relationship of employer and employee, including also a partner of a firm or an officer of a firm or corporation, if such partner or officer receives a salary for his personal services rendered in the business of such firm or corporation, but they shall not mean or include domestic servants employed in private homes and shall not include businesses, professions or occupations for which license fees are required to be paid under any General License Code of the County or to the State of Alabama or the

> County by any of the following: Chapter 12, Article 2, Title 40; Sections 40-21-50, 40-21-52, 53, 54 and 55; 40-21-57, 58, 59 and 60; 40-16-6; and 27-4-9 of the Code of Ala. 1975, as amended.

and also includes within its ambit all federal employees represented here by Plaintiffs Dykes, as follows:

> The words "vocation, occupation, calling and profession" shall also mean and include the holding of any kind of office or position either by election or appointment, by any federal, state, county or city officer or employee where the services of such official or employee are rendered within Jefferson County, Alabama.

13. The occupational tax broadly defines "employer" to "mean and include any person, business, firm, corporation, partnership, association or any other kind of organization who or that employs any person in any vocation, occupation, calling or profession in Jefferson County, Alabama, within the meaning of subsection (B) of Section 1 of this Ordinance." (This subsection is set forth in full at paragraph 12 of this complaint). Defendant, by and through its Director of Revenue and County Attorney, has interpreted "employer" to include the United States of America, and "employee" to include all federal employees in Jefferson County, including all United States District Judges in the Northern District.

14. The occupational tax by its terms, and in actual practice, exempts from its levy, collection and payment businesses and vocations or occupations listed at Chapter 12, Article 2, Title 40, Code of Ala. 1975, as amended, which range from attorneys, certified public accountants, dentists and physicians to blueprint makers, casket manufacturers, pig iron storage operators, lightning rod installers and snuff retailers, and it includes a specific exemption for domestic servants employed in private homes. By its terms and in actual practice, it taxes all

federal employees, including all United States District Judges in the Northern District of Alabama, all Circuit, District and Probate Judges in Jefferson County, and an array of other occupations, including couriers, secretaries, skilled and unskilled laborers, police officers, business executives, teachers and domestic servants not employed in private homes.

15. The net effect, dollarwise, of the occupational tax, is an absurdity which allows, by way of example, physicians and attorneys earning hundreds of thousands of dollars a year to pay a license fee of $150.00 or less and avoid the occupational tax — which would be levied at more than ten times the amount of the license fee paid by these high income professionals. In all cases, the occupational tax imposes upon those citizens against whom it is levied and collected a percentage of income tax which is substantially more than the license fees paid by similarly situated persons exempted from its burden.

16. The occupational tax, on its face and in actual practice, is arbitrary and capricious, and discriminatory in a manner which defies logic and, insofar as federal employees are concerned, 4 U.S.C. 111. The array of persons subject to the occupational tax, when compared with the array of persons exempted from the tax, and the concomitant disparity in taxes paid by and between occupations in Jefferson County, Alabama which fall within and without the burden of the occupational tax, render it irrational, unduly burdensome, and violative of the equal protection clause and the due process clause of Fourteenth Amendment to the Constitution of the United States.

17. The content, nature and characteristics of the employment of Plaintiffs Dykes, Richards and Hill, and all the members of the classes they represent, are neither reasonably, rationally or fairly different, nor professionally distinct, from the content, nature and characteristics

of the employment of the above described persons exempt from the occupational tax, and the economic burden thrust upon them by Defendant, relative to those exempted, is substantial and absurd.

18. The irrationality and unconstitutionality of the occupational tax is well known to the Defendant's officers and agents responsible for its administration and collection, and has resulted in their adoption of a policy of further exempting from its levy and collection federal employees who refuse to pay it. This pay-if-you-wish policy is itself arbitrary and capricious, irrational, indicative of Defendant's callous disregard of the constitutional rights of other federal and private employees from whom the tax is collected, and demonstrative of Defendant's cognizance of the constitutional defects complained of herein.

19. Plaintiffs aver that unless Defendant is enjoined and restrained by the court from enforcing the occupational tax ordinance, they will suffer economic injury.

COUNT ONE

DYKES CLASS BUCK ACT CLAIMS AND FEDERAL CONSTITUTIONAL CLAIMS

20. Plaintiffs Dykes, individually and on behalf of the above described class of employees of the United States which they represent, claim Defendants, a political subdivision of the State of Alabama and its Director of Revenue, acting by and through their County Attorney, and such other administrative officers as have acted and continue to act in concert with them, were and are acting under color of a statute, ordinance, regulation, custom or usage of the State of Alabama in subjecting its citizens described herein to a deprivation of rights, privileges or immunities secured by the Constitution and laws of the United States, specifically 4 U.S.C. 111 and the due pro-

cess and equal protection clauses of the Constitution of the United States.

21. The occupational tax violates the equal protection guaranties of the Fourteenth Amendment to the United States Constitution and 4 U.S.C. 111 by unreasonably and arbitrarily favoring the above described state, local and private employees who are exempted from its purview in the unequal manner described above while taxing the similarly situated federal employees represented by Plaintiffs Dykes as described herein.

22. The occupational tax has been previously challenged in this court on non-federal and other state law grounds, and, its measurement by a percentage of pay or compensation for personal service as described by 4 U.S.C. 111 notwithstanding, been declared to be a license or privilege tax rather than an income tax. *Bedingfield* v. *Jefferson County,* 527 So.2d 1270 (Ala. 1988). In the trial court in *Bedingfield, supra,* the plaintiff initially asserted that the occupational tax was, under state law, an illegal income tax; the trial court rejected that claim, and it was abandoned on appeal.

23. Plaintiffs Dykes and their similarly situated federal employee class members also claim the occupational tax is so arbitrary and irrational, as described herein, as to violate the due process clause of the Fourteenth Amendment to the Constitution of the United States, both on its face and in its application to both classes of taxpayers bringing this action.

COUNT TWO

RICHARDS/HILL CLASS FEDERAL CLAIMS

24. Plaintiffs Richards and Hill, individually and on behalf of the class of non-federal employees they represent, claim Defendants, a political subdivision of the State of Alabama, and its Revenue Commissioner, acting

in concert with their County Attorney, and such other administrative officers as have acted and continue to act in concert with them, were and are acting under color of a statute, ordinance, regulation, custom or usage of the State of Alabama in subjecting or causing its citizens described herein to a deprivation of rights, privileges or immunities secured by the Constitution and laws of the United States, specifically the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

25. The occupational tax violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by discriminating against Plaintiffs Richards and Hill, and the class of similarly situated non-federal employees they represent, a class against whom it has been and is now levied and collected, in a manner which is not only arbitrary and irrational, as described herein, but which also creates an unjust, unreasonable and improper classification of citizens subject to the tax. There is no legitimate difference between Plaintiffs Richards and Hill, and the class of non-federal employees they represent and the above described exempted employees which is related to any legitimate government object or purpose, and the arbitrariness and capriciousness of selection of the Richards/Hill class by Defendant to pay the occupational tax is clear upon the face of the taxing ordinance and in its implementation by Defendant. Persons engaged in the same businesses as Richards and Hill, and the members of the class they represent are granted exemption privileges by Defendant under employment conditions which are the same as those experienced by Richards, Hill and the Richards/Hill class, while the Richards/Hill class is contemporaneously, arbitrarily and unreasonably — in the context of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States — taxed.

26. The occupational tax has been previously challenged in the state courts on other state law grounds, and, its measurement by a percentage of pay or compensation for personal service notwithstanding, been declared to be a license or privilege tax rather than an income tax. *Bedingfield* v. *Jefferson County*, 527 So.2d 1270 (Ala. 1988). In the trial court in *Bedingfield*, *supra*, the plaintiff initially asserted that the occupational tax was, under state law, an illegal income tax; the trial court rejected that claim, and it was abandoned on appeal. Additionally, these federal constitutional claims are joined in this action with federal Buck Act claims which present a related federal statutory question under federal law.

27. Plaintiffs Richards and Hill and their similarly situated non-federal employee class members also claim the occupational tax is so arbitrary and irrational, as described herein, as to violate the due process clause of the Fourteenth Amendment to the Constitution of the United States, both on its face and in its application to both classes of taxpayers bringing this action.

COUNT THREE

DYKES CLASS PENDENT STATE LAW CLAIMS

28. Plaintiff Dykes, individually and on behalf of the above described class of employees of the United States which they represent, claim the occupational tax violates Code of Ala. 1975, Section 40-18-3, which provides that the salaries, fees, commissions or other income of officers or agents of the United States or its agencies and instrumentalities or its contractees, received from the United States or from its agencies and instrumentalities, shall be subject to income taxes levied by the state of Alabama as other income is taxed, but without discrimination, and only to the same extent and in the same

manner as other income is taxed, insofar as the State of Alabama may be constitutionally or legally authorized to tax such income.

29. The Alabama Constitution prohibits cities and counties from collecting income taxes, hence Defendant's designation of the occupational tax as a license or privilege tax, despite its measurement by a percentage of gross income or gross receipts.

30. The occupational tax, as a license tax measured by a percentage of gross income or gross receipts, authorized by a general law of the State of Alabama, is nevertheless subject to the "without discrimination" prohibition of Code of Ala. 1975, Section 40-18-3, and that code section's requirement that it be collected "only to the same extent and in the same manner as other income is taxed." Plaintiffs Dykes and the class of federal employees they represent, based upon the above described allegations regarding persons exempted from paying the occupational tax, aver that they have been discriminated against and required to pay taxes to a different extent and in a different manner from their incomes in violation of Code of Ala. 40-18-3 and the due process and equal protection provisions of the Constitution of Alabama of 1901.

COUNT FOUR

RICHARDS/HILL CLASS PENDENT STATE CLAIMS

31. Plaintiffs Richards and Hill, individually and on behalf of the class of non-federal employees subject to the occupational tax which they represent, aver that the occupational tax discriminates against non-federal employees, as described above, in a manner which violates the due process and equal protection provisions of the Constitution of Alabama of 1901.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that the Court grant and award them the following relief:

A. That a hearing be set as soon as practicable after commencement of this action, under Rule 23(c)(1), Federal Rules of Civil Procedure, to determine by order whether this action is to be maintained as a class action, and whether certification should be conditional, and whether the Richards' and Dykes' classes should be certified as sub-classes pursuant to Rule 23(c)(4)(B), Alabama Rules of Civil Procedure.

B. That the Court declare the occupational tax unconstitutional, as depriving plaintiffs of due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, violative of intergovernmental immunity secured by 4 U.S.C. 111, violative of the due process and equal protection clauses of the Constitution of Alabama of 1901, and violative of Code of Ala. 1975, Section 40-18-3.

C. That the Court declare the occupational tax unconstitutional in its application to plaintiffs, depriving them of due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, violative of intergovernmental immunity secured by 4 U.S.C. 111, violative of the due process and equal protection clauses of the Constitution of Alabama of 1901, and violative of Code of Ala. 1975, Section 40-18-3 by virtue of Defendants' policy of allowing taxpayers who disagree with the tax to disregard it while insisting upon its payment by those who cannot persuade their employers to cease payroll deductions or who otherwise lack the necessary clout with Defendants to prevent its levy and collection.

D. That the Court award plaintiffs, as compensatory damages suffered as a result of Defendant's deprivations

of the constitutional rights described herein, a sum equal to the amount of tax each has paid to the Defendant since January 1, 1988.

E. That the Court enjoin and restrain Defendant from continued deprivations of the constitutional rights described herein by way of the occupational tax.

F. That the Court allow plaintiffs and their counsel all costs in this proceeding and payment of a reasonable attorneys fee, determined by 42 U.S.C. 1988 and/or pursuant to equitable common fund principles to attorneys for plaintiffs and the classes represented by them.

G. That the Court award plaintiffs such other and further relief as the Court, after a full hearing, deems appropriate.

[Subscription of Attorney Omitted in Printing]

* * * * * * *

ANSWER

Filed May 29, 1992

[Caption Omitted in Printing]

Come now the Defendants, Jefferson County, Alabama, a political subdivision of the State of Alabama, and Randy Godeke, individually, and in his official capacity as Director of the Jefferson County, Alabama, Department of Revenue, and for answer to the Complaint state as follows:

FIRST DEFENSE

Admission and Denial

1. For answer to paragraph 1 of the Complaint, Defendants admit that Plaintiffs attempt to invoke the jurisdiction of this Court pursuant to 42 U.S.C. § 1983, 4 U.S.C. § 101 and Rule 57, Alabama Rules of Civil Procedure. Defendants admit that Jefferson County, Alabama, is the proper venue for this case.

2. For answer to paragraph 2 of the Complaint, Defendants demand strict proof in that Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations regarding residence and employment of Jason Richards, Fannie Hill, George David Dykes and Joan Foley Dykes. Defendants state that they are without sufficient information to form a belief as to the truth of the remaining allegations of paragraph 2 of the Complaint and demand strict proof.

3. For answer to paragraph 3 of the Complaint, Defendants admit that Plaintiffs attempt to invoke the provisions of Rule 23, Alabama Rules of Civil Procedure.

4. For answer to paragraph 4 of the Complaint, Defendants admit that Plaintiffs are subject to the Jefferson County occupational tax.

5. For answer to paragraph 5 of the Complaint, Defendants admit that there are numerous taxpayers.

6. For answer to paragraph 6 of the Complaint, Defendants deny that the Jefferson County occupational tax is unconstitutional.

7. For answer to paragraph 7 of the Complaint, Defendants deny that the occupational tax is unconstitutional. Defendants state that they are without information and belief as to any conflicts which may or may not exist between Plaintiffs and demand strict proof.

8. For answer to paragraph 8 of the Complaint, Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and demand strict proof.

9. For answer to paragraph 9 of the Complaint, Defendants admit that on or about January 1, 1988, Jefferson County, Alabama, began to levy and collect the occupational tax. Defendants deny that Plaintiffs paid said tax involuntarily. For answer to the remaining portion of paragraph 9 of the Complaint, Defendants plead the language of the occupational tax ordinance which is attached hereto as Exhibit "A" and Act No. 406, Legislature 1967, attached as Exhibit "B".

10. For answer to paragraph 10 of the Complaint, Defendants plead the plain language of the Jefferson County occupational tax which is attached hereto as Exhibit "A" and which speaks for itself.

11. For answer to paragraph 11 of the Complaint, Defendants plead the plain language of the Jefferson County occupational tax which is attached hereto as Exhibit "A" and which speaks for itself.

12. For answer to paragraph 12 of the Complaint, Defendants plead the plain language of the Jefferson County occupational tax which is attached hereto as Exhibit "A" and which speaks for itself.

13. Admitted.

14. For answer to paragraph 14 and 15, Defendant states as follows:

The Jefferson County Occupational Tax Ordinance No. 1120 comports with the express authority granted to the Jefferson County Commission by Act No. 406, Legislature of Alabama, 1967 ("Act No. 406"). Act No. 406 reflects an acknowledgment of the Alabama Legislature that numerous persons, corporations, firms, associations or entities were already required by State law to pay a license or privilege tax to either the State of Alabama or to the County pursuant to Article 1, Chapter 20, Title 51; Sections 176, 177, 178, 180, 182, 183, 184, 186, 429 and 826 in Title 51 of the Code of Alabama of 1940, as amended. Act No. 406 authorized the County Commission to levy a license or privilege tax upon any person, corporation, firm, association or other entity and business, vocation, occupation, calling or profession that is not required by law to pay any license or privilege tax to either the State of Alabama or the County by any of the foregoing provisions of the Code of Alabama.

The legislature in Section 6, Act No. 406, further limited the authority granted to the County Commission by declaring that:

> Section 6. No license or privilege tax levied by the governing body of the county on any person for engaging in any business shall be at a rate which is in excess of the rate of license or privilege tax levied by the largest municipality of the county on the same or similar type of business activity.

Accordingly, the Jefferson County Occupational Tax ordinance incorporates the same exclusions from its provisions as are required by Act No. 406. Further, the Jefferson County Occupational Tax Ordinance specifically excludes "domestic servants employed in private homes" for the reason that such persons are excluded from the occupational tax of the City of Birmingham which is the largest municipality located in Jefferson County, as required by Section 6, Act No. 406, above.

15. Defendants deny paragraphs 16 and 17. For further answer thereto, Defendants assert that federal employees engaged in a business, vocation, occupation, calling or profession are treated exactly the same as all other persons without regard to the nature of their employer. That is, only those federal employees that are not required by law to pay any license or privilege tax to either the State of Alabama or the County by any of the foregoing quoted provisions are subject to the occupational tax.

The purpose of Act No. 406 was to authorize the County to impose a license or privilege tax upon persons who are engaging in such businesses, vocations, occupations, callings and professions without paying any license tax through either the State or County.

Additionally, the rate of the Jefferson County Occupational Tax is exactly the same for all persons subject

thereto. Said rate is .05 percent of the gross receipts of such persons earned in Jefferson County. There is no difference in rate between persons employed by the federal government and all other persons who are subject to the tax.

16. Defendants deny paragraph 18. For further answer Defendants assert that Defendants have instituted a reasonable and orderly procedure to effect collection of the occupational tax. Substantial start up work and effort has been required to develop the required information so as to identify those persons subject to the tax and to initiate tax withholding procedures by employers in the County. Substantial efforts were required to achieve such withholding action by the federal employers in Jefferson County. No exceptions from the tax beyond those required by Act No. 406 have been established or allowed. A program to collect arrearages from persons who have failed or refused to pay the tax as required by law is ongoing.

17. Defendants deny paragraph 19.

18. For answer to paragraph 20 of the Complaint, Defendants deny that they have deprived Plaintiffs of any right, privilege or immunity secured by the Constitution or laws of the United State of America.

19. Denied.

20. For answer to paragraph 22 of the Complaint, Defendants admit that the occupational tax at issue in this case has been previously challenged in the state courts on both federal and state constitutional claims. Defendants aver that the occupational tax at issue in this case has already been held constitutional by the Alabama Supreme Court in the case *Bedingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988). Further, that the Plaintiffs in *Bedingfield* had the opportunity to appeal the *Bedingfield* decision of the Alabama Supreme Court to the Supreme Court of the United States, which opportunity said Plain-

tiffs failed to pursue and thereby waived and forfeited and which decision of the Alabama Supreme Court is now a matter adjudged and conclusive upon and res judicata to all of the rights of Plaintiffs asserted herein. Defendants deny the remaining allegations of paragraph 22 of the Complaint.

21. Denied.

22. For answer to paragraph 24 of the Complaint, Defendants deny that they have deprived Plaintiffs of any right, privilege or immunity secured by the Constitution or laws of the United States of America.

23. Denied.

24. For answer to paragraph 26 of the Complaint, Defendants admit that the occupational tax at issue in this case has been previously challenged in the state courts on both federal and state constitutional claims. The Alabama Supreme Court has held that the occupational tax at issue in this case is constitutional. *Bedingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988). Defendants deny the remaining allegations of paragraph 26 of the Complaint.

25. Denied.

26. Denied.

27. Denied.

28. Denied.

29. Denied.

30. Defendants deny each and every remaining allegation of the Complaint and demand strict proof thereof.

SECOND DEFENSE

Res Judicata

Defendants plead the affirmative defense of res judicata as a complete or partial bar to the causes of action set forth in the Complaint.

THIRD DEFENSE

Collateral Estoppel

Defendants plead the affirmative defense of collateral estoppel to the causes of action set forth in the Complaint.

FOURTH DEFENSE

Non Claim Statute

Defendants plead the Alabama non claim statute as a complete or partial bar to the relief requested in the Complaint.

FIFTH DEFENSE

Laches

Defendants plead the defense of laches as a complete or partial bar to the causes of action set forth in the Complaint.

SIXTH DEFENSE

Statute of Limitations

Defendants plead the applicable statute of limitations as a complete or partial bar to the relief sought in the Complaint.

SEVENTH DEFENSE

No Deprivation of Federally Protected Right

Defendants aver that Plaintiffs have not been deprived of any right, privilege or immunity secured by the Constitution or laws of the United States of America.

EIGHTH DEFENSE

Voluntary Payment

Defendants aver that all payments made by named Plaintiffs have been voluntary.

NINTH DEFENSE

No Buck Act Violation

Defendants plead the provisions of 4 U.S.C. § 106 as a defense to Plaintiffs' Buck Act claims.

TENTH DEFENSE

Immunity

Defendant, Godeke, pleads the defense of immunity whether absolute, qualified, good faith or discretionary function.

ELEVENTH DEFENSE

Waiver

Defendants plead the affirmative defense of waiver as a complete or partial bar to the causes of action set forth in the Complaint.

TWELFTH DEFENSE

General Defenses

1. Defendants assert that the Complaint fails to state a cause of action upon which relief can be granted.

2. Defendants plead good faith in all their dealings with Plaintiffs.

3. Defendants plead the general issue.

[Subscription of Attorney and Certificate of Service Omitted in Printing]

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MOTION BY BIRMINGHAM-JEFFERSON CIVIC CENTER AUTHORITY FOR AN ORDER TO INTERVENE

Filed June 4, 1992

[Caption Omitted in Printing]

Comes now the Intervenor/Defendant, Birmingham-Jefferson Civic Center Authority ("BJCC"), by and through the undersigned attorneys, and moves this court for leave to intervene pursuant to Rule 24(a)(2), Alabama Rules of Civil Procedure, or in the alternative, pursuant to Rule 24(b)(2), Alabama Rules of Civil Procedure, and as grounds in support thereof, states as follows:

1. That on or about April 21, 1992, the Plaintiffs, Jason Richards, Fannie Hill, George David Dykes and Joan Foley Dykes (the "Plaintiffs"), filed with this court the above referenced matter.

2. That the Plaintiffs' complaint seeks to have Ordinance No. 1120 which was adopted by the Jefferson County Commission pursuant to Act No. 406, enacted at the 1967 regular session of the Alabama Legislature, as amended, (the "Occupational Tax") declared unconstitutional as depriving the Plaintiffs of due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, violative of intergovernmental immunities secured by 4 U.S.C. § 111, violative of the due process and equal protection clauses of the Constitution of Alabama of 1901, and violative of *Ala. Code* § 40-18-3 (1975).

3. That Plaintiffs' complaint seeks an injunction restraining the Defendants from alleged constitutional deprivations of the Plaintiffs' constitutional rights described in said complaint by way of the Occupational Tax.

4. That on January 15, 1989, the BJCC issued Capital Outlay Special Tax Bonds, Series 1989 in the principle amount of $83,710,000.00 for the purpose of providing funds to expand and improve portions of the BJCC complex. *See* Birmingham-Jefferson Civic Center Authority Capital Outlay Special Tax Bonds, Series 1989 a true and correct copy of which is attached hereto as Exhibit "A" and incorporated herein.

5. That on August 15, 1989, the BJCC issued Capital Outlay Special Tax Bonds, Series 1989B in the principle amount of $48,670,000.00 for the purpose of providing funds to be used to expand and improve portions of the BJCC complex. *See* Birmingham-Jefferson Civic Center Authority Capital Outlay Special Tax Bonds, Series 1989B

a true and correct copy of which is attached hereto as Exhibit "B" and incorporated herein.

6. That pursuant to that certain Pledge and Appropriation Agreement between the Defendant, Jefferson County and the Intervenor, said Defendant appropriated, pledged and agreed to pay a portion of the proceeds of the Occupational Tax issue in this matter to the BJCC for repayment of the Series 1989 and Series 1989B Capital Outlay Special Tax Bonds issued by the BJCC in twenty (20) annual payments of $10,000,000.00 beginning in the year 1989 and ending in the year 2008. *See* attached hereto as Exhibit "C" a true and correct copy of said Pledge and Appropriation Agreement between the Defendant, Jefferson County and the BJCC.

7. That the Plaintiffs' complaint seeks to ultimately have declared as unconstitutional and/or unlawful the Occupational Tax which is the primary source of revenue pledged specifically to satisfy the BJCC's Series 1989 and 1989B Capital Outlay Special Tax Bonds, and further seeks to have Defendant repay to Plaintiffs all payments made pursuant to said tax.

8. That of the total $132,470,000.00 received by the BJCC from the issuance of the Series 1989 and Series 1989B, Capital Outlay Special Tax Bonds, approximately $125,000,000.00 has either already been spent or contractually obligated to be paid by the BJCC.

9. That the BJCC's Series 1989 and 1989B Capital Outlay Special Tax Bonds which were issued by the BJCC and purchased by the bondholders in reliance upon the County's obligation to levy and collect the Occupational Tax constitute an "interest" which is the subject of the action presented by the Plaintiffs' complaint.

10. That an order declaring the Occupational Tax unconstitutional and/or unlawful, as a practical matter, will impair and/or impede the BJCC's ability to protect its interest and the interest of the bondholders.

11. That attached hereto as Exhibit "D" and incorporated herein by reference is the BJCC's proposed Answer to the Plaintiffs' Complaint.

12. That defenses asserted in Exhibit "D" presents both questions of law and fact common with Plaintiffs' Complaint.

13. That this motion to intervene is, and has been, presented to this Court timely.

14. That the legal interest of the BJCC will not be adequately protected by the Defendant.

WHEREFORE, PREMISES CONSIDERED, the Intervenor/Defendant, the Birmingham-Jefferson Civic Center Authority, respectfully moves this Court for an order allowing it to intervene into this civil action.

[Subscription of Attorney and Certificate of Service Omitted in Printing]

* * * * * * *

MOTION FOR SUMMARY JUDGMENT

Filed June 4, 1992

[Caption Omitted in Printing]

COME NOW the Defendants, Jefferson County, Alabama, a political subdivision of the State of Alabama, and Randy Godeke, individually and in his official capacity as Director of Revenue of Jefferson County, Alabama and hereby *Move For Summary Judgment* in their favor in accordance with Rule 56, Alabama Rules of Civil Procedure as follows.

The Jefferson County Occupational Tax has already been challenged and upheld on both state and federal constitutional grounds. In *Bedingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988) the Alabama Supreme Court held that Act 406 and Jefferson County Ordinance 1120 imposing the occupational tax were constitutional. This suit is clearly barred by the doctrine of res judicata. The

material facts are undisputed. Defendants are entitled to a judgment as a matter of law.

This motion is supported by the *Bedingfield* opinion attached as Exhibit A; excerpts of the *Bedingfield* complaints collectively attached hereto as Exhibit B; the trial court's final order in the Bedingfield case attached hereto as Exhibit C; excerpts of Bedingfield's appellate briefs collectively attached hereto as Exhibit D; Amicus Briefs on behalf of the AFL-CIO, Birmingham Area Chamber of Commerce, Public Employees Local Union 1317, and Shelby County, Alabama collectively attached hereto as Exhibit E; Alabama Act No. 406, Legislature 1967 attached as Exhibit F [hereafter referred to as "Act No. 406"]; and, Jefferson County Occupational Tax Ordinance No. 1120 attached as Exhibit G [hereafter referred to as "Ordinance No. 1120"].

FACTS

1. On September 28, 1987 the Jefferson County Commission adopted Ordinance 1120 levying a county-wide occupational tax effective January 1, 1988.

2. THE PRIOR SUIT. In October, 1987 the City of Birmingham, Alabama and Hoyt Bedingfield, individually and in his official capacity as Finance Director for the City of Birmingham, filed suit in the Tenth Judicial Circuit against Jefferson County, Alabama and the Jefferson County Commission and alleged that Act No. 406 and Ordinance No. 1120 were violative of the state and federal constitutions and were, therefore, void. The Verified Complaint [attached at Exhibit B] stated a cause of action under the Alabama Declaratory Judgment Act § 6-6-220, Alabama Code; Sections 44, 45, 71, 104, 105, 212, Alabama Constitution; and the equal protection and due process clauses of the United States and Alabama Constitutions. This suit was denominated Case No. CV 87-504-465.

3. In October, 1987 Carolyn Phillips, John Rogers and Dale Patton, all individuals, filed suit against the Jefferson County Commission in the Tenth Judicial Circuit and also alleged that Act No. 406 and Ordinance No. 1120 were unconstitutional and void. That case was denominated Case No. CV 87 504-469. That Complaint alleged that the Act and Ordinance violated Sections 105, 106, 110, Alabama Constitutional and the due process clause, equal protection clause and Fourteenth Amendment to the United States Constitution. [Complaint attached as Exhibit B].

4. In November, 1987 Phillips, Rogers and Patton amended their complaint to expand their federal equal protection and due process claims and to add federal civil rights claims pursuant to 42 USC § 1983 and 1988. [Amended Complaint also attached at Exhibit B].

5. The cases were consolidated by order of the trial court dated November 18, 1987. [Order also attached as Exhibit B].

6. The consolidated cases were tried on December 2, 1987 and final judgment in favor of the County was entered on December 11, 1987. [Final Order attached as Exhibit C].

7. The consolidated cases were appealed to the Alabama Supreme Court. In their brief, Appellants argued that Act No. 406 and Ordinance No. 1120 violated the federal and state constitutions. [Excerpts of Bedingfield brief attached as Exhibit D].

8. The Alabama Supreme Court permitted amicus briefs from the Birmingham Area Chamber of Commerce, the Alabama AFL-CIO, the Laborers International Union of North America, Local 1317, and Shelby County, Alabama. All of the amicus briefs asserted federal equal protection and state constitutional challenges against the occupational tax. [Amicus Briefs attached as Exhibit E].

9. On May 20, 1988 the Alabama Supreme Court released its opinion wherein it affirmed the trial court and held that Act No. 406 and Ordinance No. 1120 were constitutional. [Bedingfield opinion attached hereto as Exhibit A].

INTRODUCTION

This is a tax case. Plaintiffs assert causes of action under the Alabama Declaratory Judgment Act; the equal protection clause of the United States Constitution; 42 USC § 1983; and the Buck Act — 4 USC § 101 et seq.

As set forth below, this action is barred by the Doctrine of Res Judicata. The occupational tax at issue has already been challenged on both federal and state constitutional grounds and has been upheld by the Alabama Supreme Court. The material facts are undisputed. Accordingly, the County is due the entry of summary judgment in its favor.

ARGUMENT

The elements of the affirmative defense of res judicata are: (1) a prior judgment on the merits; (2) rendered by a court of competent jurisdiction; (3) substantial identity of the parties; and (4) substantially same cause of action. *Baker v. City of Guntersville,* 1992 WL 69934 (Ala. Civ. App. April 10, 1992), adopting, *NAACP v. Hunt,* 891 F.2d 1555 (11th Cir. 1990); *Dairyland Insurance Co. v. Jackson,* 566 So.2d 723 (Ala. 1990). These elements are discussed as follows.

1. PRIOR JUDGMENT

Clearly, the *Bedingfield* trial court and Supreme Court rendered prior judgments on the merits.

2. COURT OF COMPETENT JURISDICTION

Clearly, the trial court and Alabama Supreme Court had jurisdiction over the *Bedingfield* case.

3. SUBSTANTIAL IDENTITY OF PARTIES

In *Dairyland, supra,* the Supreme Court held that:

> [T]he party identity criterion of res judicata does not require complete identity, but only that the party against whom res judicata is asserted was either a party *or* in privity with a party to the prior action *or* that the non-party's interests were adequately represented by a party in the prior suit, and the relationship between the party and non-party is not so attenuated as to violate due process.

566 So.2d at 725, 726, citing, *Whisman v. Alabama Power Co.,* 512 So.2d 78, 82 (Ala. 1987).

In *NAACP v. Hunt, supra,* the Eleventh Circuit applied Alabama res judicata law to bar a second suit challenging the display of the Confederate battle flag on the Alabama capitol. The Court defined privity as "a relationship between one who is sufficiently close so as a judgment for or against the party should bind or protect the nonparty." 891 F.2d at 1560. The court further held:

> privity exists where the nonparty's interests were represented adequately by the party in the original suit. Privity also exists where a party to the original suit is so closely aligned to a nonparty's interest as to be his virtual representative.

891 F.2d at 1560, citing, *United Merchants v. Sanders,* 508 So.2d 689, 692 (Ala. 1987).

The "interests" of Hoyt Bedingfield, Carolyn Phillips, John Rogers, Dale Patton, the City of Birmingham, the Birmingham Area Chamber of Commerce, the AFL-CIO, the Public Employees Local 1317 and the citizens of Shelby County, Alabama are *identical* to the interests of the named plaintiffs in the instant suit. The former Plaintiff's sought to avoid payment of the County occupational tax. The current Plaintiffs seek to avoid payment of

the occupational tax. Clearly, the former plaintiffs interests were "so closely aligned with (current plaintiffs) as to be their virtual representative."

If the former Plaintiffs had prevailed, the instant plaintiffs would rightfully claim res judicata in a subsequent suit against *them* to compel payment of the tax. Accordingly, there exists "a relationship between (former plaintiffs) and (current plaintiffs) so as a judgment in favor of (former plaintiffs) would have protected (current plaintiffs). The instant plaintiffs would have been protected had the *Bedingfield* Plaintiffs prevailed. Therefore, pursuant to the tests employed by the Alabama Courts, the instant plaintiffs are in privity with the *Bedingfield* parties.

4. SUBSTANTIALLY SAME CAUSE OF ACTION

Res judicata is a defense not only to the precise legal theory presented in the prior case, *but to all legal theories and claims arising out of the same nucleus of operative fact. Baker v. City of Guntersville, supra; NAACP v. Hunt,* 891 F.2d at 1561. The legal theories and claims in the instant case clearly arise from the same "nucleus of operative fact" as those asserted in *Bedingfield* (i.e. the levy of an occupational tax). All of the theories raised by current plaintiffs either were raised or *could have* been raised by former plaintiffs. The Alabama Courts have repeatedly held that res judicata bars any claim which *was* or *could have been* adjudicated in the previous action. *Dairyland, supra,* 566 So.2d at 725. *Hughes v. Allenstein,* 514 So.2d 858 (Ala. 1987).

In *NAACP v. Hunt, supra,* the Eleventh Circuit, applying Alabama res judicata law, held that a second suit to remove the confederate flag from the state capitol was barred by res judicata despite the fact that the second suit contained *new* constitutional and federal statutory claims which were not litigated in the prior case. The Court held that "[b]ecause (plaintiff) *could have* raised

the same First Amendment and section 1988 claims in the first action, the claims are identical. The action is thus precluded under res judicata." 891 F.2d at 1561.

It is immaterial that current plaintiffs seek money damages in addition to equitable relief. In *Robinson v. Holley,* 549 So.2d 1 (Ala. 1989), the Supreme Court held that a difference in requested relief is *not* grounds for distinguishing two causes of action for res judicata purposes. *Robinson I* involved the removal of an estate administration to the Elmore County Circuit Court in which the beneficiary received an adverse declaratory judgment and accounting. *Robinson II* was a suit in the Jefferson County Circuit Court wherein the same beneficiary brought a fraud action against the executor and trustee of the estate. The dismissal of the Jefferson County suit on res judicata grounds was affirmed by the Supreme Court which ruled that a plaintiff cannot escape the doctrine of res judicata by pleading different causes of action or asserting new elements of damages in a second suit. The court held:

> The basis of this rule is that a cause of action grows out of the wrongful action and not out of the various forms of damages that may flow from the single wrongful act. *Chappell v. Boykin,* 41 Ala. App. 137, 127 So.2d 636 (1960) cert denied, 271 Ala. 697, 127 So.2d 641 (Ala. 1961).

The Supreme Court has repeatedly held that the principal test to determine whether two suits involve substantially the same cause of action is whether the same evidence would support a recovery in both suits. *Garris v. South Alabama Production Credit,* 5367 So.2d 911 (Ala. 1989); *Dominex Inc. v. Key,* 456 So.2d 1047 (Ala. 1984); Wheeler v. First Alabama Bank, 364 So.2d 1190 (Ala. 1978). In *Garris,* the Court held:

> Regardless of the form of the action, the issue is the same when it is supported in both actions by

> *substantially* the same evidence. If it be so supported, a judgment in one action is conclusive upon the same issue in any suit, *even if the cause of action is different.*

537 So.2d at 914.

The evidence necessary to have Act 406 and Ordinance No. 1120 declared unconstitutional is the same today as it was when Bedingfield filed suit in 1987. The facts have not changed. The evidence available to the plaintiffs in the earlier case is *identical* to the evidence available to plaintiffs in the instant suit. The Alabama Supreme Court has already reviewed that evidence and determined that the tax is constitutional. Therefore, it is clear that the "substantially same evidence" test is satisfied despite the fact the instant plaintiffs have plead additional causes of action beyond those litigated in the earlier case.

CONCLUSION

As demonstrated above, there was (1) an earlier judgment on the merits; (2) by a court of competent jurisdiction; (3) the instant plaintiffs are in privity with the former plaintiffs; and (4) the issues in both suits are substantially the same. Res judicata bars the relitigation of all issues raised in the earlier case *and* all issues which could have been raised in that case. All of the claims asserted by Plaintiff *were or could have been* litigated by the *Bedingfield* plaintiffs. Therefore, this action is barred.

WHEREFORE, PREMISES CONSIDERED, Defendants respectfully request the entry of summary judgment in their favor.

[Certificate of Service Omitted in Printing]

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Act No. 406

Enacted at 1967 Regular Session of the Legislature of Alabama

[Title of Act Omitted in Printing]

Section 1. This Act shall apply to any county of the State of Alabama having a population of 500,000 or more, according to the last or any subsequent federal census, and to no other county.

Section 2. As used in this Act, the following words and terms have the meanings hereby ascribed to them; "the county" means a county subject to this Act; "the governing body" means the governing body of the county, whether it be a county commission, board of revenue or other governing body; "person" includes any natural person, corporation, firm, association or other entity; and "business" includes business, vocation, occupation, calling or profession; "license or privilege tax" shall not include any sales or use tax.

Section 3. The purpose of this Act is to equalize the burden of taxation by authorizing the county to impose a license or privilege tax upon persons now engaging in certain businesses without paying any license tax thereon to either the state or county.

Section 4. The governing body of the county is hereby authorized to levy a license or privilege tax upon any person for engaging in any business for which he is not required by law to pay any license or privilege tax to either the State of Alabama or the county by any of the following Article 1, Chapter 20, Title 51; Sections 176, 177, 178, 180, 182, 183, 184, 186, 429, and 826 in Title 51 of the Code of Alabama of 1940 as amended.

When a person is engaged in more than one business for one or more of which a license or privilege tax is required to be paid to the State or the county but for one or more of which no license or privilege tax is required

to be paid to the State or county, the county governing body shall have the authority to levy a license or privilege tax upon that business, or those businesses, for engaging in which such person is not required to pay any license or privilege tax to the State or county.

Section 5. The tax hereby levied shall be paid to that officer or employee of the county chargeable with the duty of collecting license or privilege taxes payable to the county.

Section 6. No license or privilege tax levied by the governing body of the county on any person, for engaging in any business shall be at a rate which is in excess of the rate of license or privilege tax levied by the largest municipality of the county on the same or similar type of business activity.

Section 7. It is hereby provided that all laws or parts of law in conflict with provisions of this Act are hereby repealed to the extent of such conflict.

Section 8. The provisions of this Act are severable; and should any part of this Act be declared unconstitutional or void, such declaration shall not affect the remaining provisions.

Section 9. This Act shall become effective upon its approval by the Governor or upon its otherwise becoming a law.

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ORDINANCE NO. 1120

Adopted by the Jefferson County
Commission on September 29, 1987

An Ordinance to establish a license or privilege tax on persons engaged in any vocation, occupation, calling or profession in Jefferson County who is not required by law to pay any license or privilege tax to either the State of Alabama or the County as set out herein.

BE IT RESOLVED AND ORDAINED by the Jefferson County Commission as follows:

Section 1. DEFINITIONS. That the following words, when used in this Ordinance, shall have the meaning ascribed to them, except where the context clearly indicates or requires a different meaning:

(A) The word "person" shall mean any natural person. Whenever the word "person" is used in any clause prescribing and imposing a penalty in the nature of a fine or imprisonment, the work as applied to a partnership or other form of unincorporated enterprise shall mean the partners or members thereof, and as applied to corporations shall mean the officers and directors thereof.

(B) The words "vocation, occupation, calling and profession" shall mean and include the doing of any kind of work, the rendering of any kind of personal services, or the holding of any kind of position or job within Jefferson County, Alabama, by any clerk, laborer, tradesman, manager, official or other employee, including any nonresident of Jefferson County who is employed by any employer as defined in this section, where the relationship between the individual performing the services and the person for whom such services are rendered is, as to those services, the legal relationship of employer and employee, including also a partner of a firm or an officer of a firm or corporation, if such partner or officer receives a salary for his personal services rendered in the business of such firm or corporation, but they shall not mean or include domestic servants employed in private homes and shall not include businesses, professions or occupations for which license fees are required to be paid under any General License Code of the County or to the State of Alabama or the County by any of the following: Chapter 12, Article 2, Title 40; §§40-21-50, 40-21-52, 53, 54 and 55; 40-21-57, 58, 59, and 60; 40-16-6; and 27-4-9 of the Code of Ala. 1975, as amended.

(C) The words "vocation, occupation, calling and profession" shall also mean and include the holding of any kind of office or position either by election or appointment, by any federal, state, county or city officer or employee where the services of such official or employee are rendered within Jefferson County, Alabama.

(D) The word "employee" shall mean and include any person engaging in or following any vocation, occupation, calling or profession within the meaning of subsection (B) of Section 1 of this Resolution and Ordinance.

(E) The word "employer" shall mean and include any person, business, firm, corporation, partnership, association or any other kind of organization who or that employs any person in any vocation, occupation, calling or profession in Jefferson County, Alabama, within the meaning of subsection (B) of Section 1 of this Ordinance.

(F) The words "gross receipts" and "compensation" shall have the same meaning, and both words shall mean and include the total gross amount of all salaries, wages, commissions, bonuses or other money payment of any kind, or any other consideration having monetary value, which a person receives from or is entitled to receive from or be given credit for by his employer for any work done or personal services rendered in any vocation, occupation, calling or profession, including any kind of deductions before "take home" pay is received; but the words "gross receipts" and "compensation" shall not mean or include amounts paid to traveling salesmen or other workers as allowance or reimbursement for traveling or other expenses incurred in the business of the employer, except to the extent of the excess of such amounts over such expenses actually incurred and accounted for by employee to the employer.

(G) The word "licensee" shall mean and include any person required to file a return or to pay a license fee under this ordinance.

(H) The word "county" shall mean Jefferson County, Alabama.

(I) The words "Director of Revenue" shall mean the Director of Revenue of Jefferson County, Alabama.

(J) The singular shall include the plural and vice versa, and the masculine shall include the feminine and the neuter.

Section 2. LICENSE FEES REQUIRED. It shall be unlawful for any person to engage in or follow any vocation, occupation, calling or profession as defined in Section 1 within the County on and after the 1st day of January, 1988, without paying license fees to the County for the privilege of engaging in or following such vocation, occupation, calling or profession, which license fees shall be measured by one-half percent (1/2%) of the gross receipts of each such person.

Section 3. WHERE WORK DONE OR SERVICES PERFORMED BOTH WITHIN AND WITHOUT THE COUNTY. In cases where compensation is earned as a result of work done or services performed both within and without the county, the license fees required under this Ordinance shall be computed by determining upon the Oath of the employer, or if required by the Director of Revenue upon the oath of the employee, that percentage of the compensation earned from the proportion of the work which was done or performed within the County.

Section 4. EMPLOYERS TO WITHHOLD LICENSE FEES AND FILE RETURNS. Each employer shall deduct from each payment due each employee the amount of the license fees measured by one-half per centum (1/2%) of the compensation due each employee beginning on the 1st day of January, 1988. The payments required

to be made on account of such deductions by employers shall be made monthly to the County for the monthly periods ending January 31, February 28, March 31, April 30, May 31, June 30, July 31, August 31, September 30, October 31, November 30 and December 31st of each year, on or before the twentieth day of the month next following the end of each such monthly period, and each employer shall at the same time make a return in connection therewith on a form made available to such employer by the Director of Revenue at the office of the Director of Revenue, provided that, if the total amount deducted from payments made to or due all employees of an employer is less than fifty ($50.00) dollars during each calendar month of the previous calendar year, then such employer may elect, for the current calendar year, to remit such deductions to the County for the quarterly periods ending March 31st, June 30th, September 30th and December 31st of such following calendar year, on or before the twentieth day of the month next following the end of each such quarterly period, and each such employer shall at the same time make a return in connection therewith on a form made available to such employer by the Director of Revenue at the office of Director of Revenue. Provided, however, that the failure or omission by any employer to deduct such license fees shall not relieve an employee from the payment of such license fees and compliance with the requirements for making returns as provided in this Ordinance, or with any regulations promulgated under this Ordinance. Each employer shall file in the office of the Director of Revenue on or before January 31, of each year a return on a form made available by said Director of Revenue, at the office of said Director of Revenue, which return shall show the gross amount of compensation of each employee, the amount of license fees deducted and paid by such employer for all or any part of the preceding calendar year and the last known address of each such employee. Each employer shall keep accurate records of all such compensation, deductions, license fees, payments and returns. Such records shall be kept and maintained by each such employer for not less than five (5) years subsequent to the date such compensation was earned.

Section 5. RETURNS TO BE FILED BY EMPLOYEES. When a monthly or quarterly return, as required by Section 4 hereof is not filed by an employer and the license fees are not paid to the County by such employer monthly as herein provided, the employee for whom no return has been filed and no payment has been made shall file a return with the Director of Revenue on or before the 1st day of the second month next following the end of each such monthly or quarterly period, showing in said return his gross receipts subject to license fees for such month or quarter, and he shall also file a return with the Director of Revenue on or before January 31st of each year thereafter in which his employer has failed to file any monthly or quarterly return required in the preceding calendar year, showing on said return the gross receipts subject to license fees during the preceding calendar year. If for any reason all license fees of a person subject to the provisions of this Ordinance were not withheld by his employer from his gross receipts, such person shall file each return required by this Section on a form obtainable at the office of the Director of Revenue. In addition to the gross receipts earned by him, such return shall show such other pertinent information as may be required by the Director of Revenue. Each person making a return required by the Section shall, at the time of filing thereof, pay to the County the amount of license fees due under this Ordinance; provided, however, that any portion of the license fees deducted at the source shall be deducted on the return and only the balance, if any, shall be due and payable at the time of

filing said return. Each employee shall keep accurate records of all such compensation, deductions, license fees, payments and returns. Such records shall be kept and maintained by each such employee for not less than five (5) years subsequent to the date such compensation was earned.

Section 6. DUTIES OF THE DIRECTOR OF REVENUE. It shall be the duty of the Director of Revenue to collect and receive all license fees imposed by this Ordinance and to keep records showing the amounts received by him from each employer. All moneys received by the Director of Revenue shall be deposited in a duly approved depository.

Section 7. INVESTIGATIVE POWERS OF THE DIRECTOR OF REVENUE. The Director of Revenue or any agent or employee designated by him is hereby authorized to examine the books, papers and records of any employer or supposed employer, or of any license or supposed license, in order to determine the accuracy of any return made, or if no return was made to ascertain the amount of license fees due under the terms of this Ordinance by such examination. Each such employer or supposed employer or licensee or supposed licensee shall give to the Director of Revenue, or to his duly authorized agent or employee, the means, facilities and opportunities for the making of such examination and investigation. The Director of Revenue is hereby authorized to examine any person under oath concerning any gross receipts which were or should have been shown in a return, and to this end he may compel the production of books, papers, records and the attendance of all persons before him, whether as parties or as witnesses, whom he believes to have knowledge of such gross receipts or compensation.

Section 8. REGULATIONS MAY BE PROMULGATED. The Director of Revenue may prescribe, adopt,

promulgate and enforce reasonable rules and regulations not in conflict with this Ordinance relating to any matter or thing pertaining to the administration and enforcement of the provisions of this Ordinance, including but not limited to provisions for the re-examination and correction of returns as to which overpayment or underpayment is claimed or found to have been made, and the regulations so promulgated shall be binding upon all licensees and employers.

Section 9. INFORMATION TO BE CONFIDENTIAL. Notwithstanding any resolutions and ordinances to the contrary, any information gained by the Director of Revenue or any other official or agent or employee of the County as a result of any returns, investigations, hearings, or verifications required or authorized by this Ordinance shall be confidential, except for official purposes, or in accordance with proper judicial order, or the enforcement of this Ordinance, and any person or agent divulging such information, except as herein permitted, shall upon conviction be subject to a fine of not more than One Hundred Dollars ($100.00) or to imprisonment of not exceeding thirty (30) days, or to both such fine and imprisonment.

Section 10. INTEREST AND PENALTIES.

(A) All license fees imposed by this Ordinance which are delinquent, that is, which remain unpaid after they become due shall, subject to the provisions hereinafter set out, bear interest at the rate of twelve percentum (12%) per annum, and any person who has failed to pay such license fees when the same became due shall, subject to the provisions hereinafter set out, also be charged a penalty of ten percentum (10%) of the amount of such unpaid license fees. Any person or employer who fails or refuses to withhold any license fees payable under this Ordinance, or who fails to pay such fees after withholding the same to the County at the time it is due, as pro-

vided under the provisions of Section 4 hereof, shall become liable to the County for such fees, as well as for the interest thereon at the rate of twelve percentum (12%) per annum, and for the aforesaid penalty. Provided, however, that the minimum penalty imposed against such person or employer shall be Three Dollars ($3.00). Provided the Director of Revenue, if a good and sufficient reason is shown for the failure to pay the tax within the time required, may waive or remit the penalty and interest, or a portion of either, upon payment of the tax due.

(B) Any person or employee who shall fail, neglect or refuse to pay a license fee as by this Ordinance required, or any employer who shall fail to withhold said license fees, or to pay over to County such license fees, penalties or interest imposed by this Ordinance, or any person required to file a return under the provisions of Section 5 of this Ordinance, who shall fail, neglect or refuse to file such return, or any person or employer who shall refuse to permit the Director of Revenue or any agent or employee designated by him, in writing, to examine his books, records and papers for any purpose authorized by this Ordinance, or who shall knowingly make any incomplete, false or fraudulent return, or who shall attempt to do anything whatever to avoid the full disclosure of the amount of gross receipts or compensation in order to avoid the payment of the whole or any part of a license fee, shall upon conviction be subject to punishment within the limits of and as provided by law for each offense. Such punishment shall be in addition to the penalties imposed under subsection (A) of this section.

Section 11. EXTENSION OF TIME FOR MAKING RETURN. The Director of Revenue, for good cause, may extend the time for making any return required under the provisions of this Ordinance, but the time for filing any such return shall not be extended for a greater period than thirty (30) days from the day such return is due

to be made and shall not prevent penalty and interest from accruing during the period of such extension.

Section 12. USE OF LICENSE FEES. All money derived from license fees under the provisions of this Ordinance shall be paid to the General Fund of the County and expended as authorized by law.

Section 13. SEVERABILITY. The provisions of this Ordinance are severable. If any provision, section, paragraph, sentence or part thereof, or the application thereof to any employer or licensee or class or persons, shall be held unconstitutional or invalid, such decision shall not affect or impair the remainder of the Ordinance, it being the legislative intent to ordain and enact each provision, section, paragraph, sentence and part thereof, separately and independently of each other.

Section 14. REPEAL OF RESOLUTION AND ORDINANCES. All resolutions and ordinances or parts of resolutions and ordinances in conflict with this Ordinance are to the extent of such conflict hereby repealed.

Section 15. EFFECTIVE DATE. This Ordinance shall be in full force and effect on and after January 1, 1988, and from year to year thereafter, until repealed.

****

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
IN EQUITY

HOYT BEDINGFIELD, JR., individually and in his capacity as Acting Director of Finance of the City of Birmingham, and THE CITY OF BIRMINGHAM, *Plaintiffs,*	)	CIVIL ACTION NO.
v.	)	
JEFFERSON COUNTY, ALABAMA, REUBEN DAVIS, JIM GUNTER, JOHN KATAOPODIS, CHRIS McNAIR, and DAVID ORANGE in their official capacities as Commissioners of Jefferson County, *Defendants.*	)	

VERIFIED COMPLAINT

1. This is a complaint for a declaratory judgment and other equitable relief.

2. This action is brought pursuant to the Alabama Declaratory Judgments Act, *Ala. Code* § 6-6-220 *et seq.* (1975), and Rules 57 and 65, Alabama Rules of Civil Procedure, for a declaratory judgment that Ordinance No. 1120 adopted by the Jefferson County Commission is void and invalid, and if necessary, that Act No. 406 passed by the Alabama Legislature in 1967 and approved by the Governor on September 7, 1967, is void and invalid to the extent that it supports any comprehensive occupational tax on all persons working in Jefferson County. *Ala. Code* § 6-6-223 specifically authorizes the declaratory judgment with respect to such statutes and ordinances. Plaintiffs allege that there is presently uncertainty and insecurity as to the rights and legal relations of

the parties, as to the matters at issue in this action, and that a declaratory judgment is needed to determine those rights and legal relations.

3. Venue is proper in this Court.

4. Attached hereto as Appendix "A" is Ordinance No. 1120 adopted by the Jefferson County Commission on or about the 29th day of September, 1987 to be effective January 1, 1988. Said ordinance purports to establish a licensed or privileged tax on persons engaged in any vocation, occupation, calling or profession in Jefferson County who is not required by law to pay any licensed or privileged tax to either the State of Alabama or the County.

5. It is the well established law in Alabama that county governments lack the authority to impose taxes unless specifically authorized by the Legislature.

6. The defendants or some of them have publicly contended that Ordinance No. 1120 is authorized by Act 406 adopted by the Alabama Legislature in 1967 and approved by the Governor on September 7, 1967. A copy of that Act is attached as Appendix "B".

7. During the 1987 regular session of the Alabama Legislature, the defendants recognized that they did not have authority to enact a comprehensive occupational tax like the one purported to be adopted in Ordinance No. 1120, and the defendants, or most of them, had proposed in the Alabama Legislature House Bill No. 941, purporting to give them the authority to adopt an occupational tax. A copy of that bill is attached as Appendix "C". It failed to pass the Alabama Legislature.

8. If put into effect, Ordinance No. 1120 would have a dramatic effect upon the plaintiffs. First with respect to plaintiff Bedingfield individually, the occupational tax would be taken from his salary. Second, plaintiff Bedingfield, as acting Director of Finance of the City of Birmingham, needs an immediate declaration as to

whether Ordinance No. 1120 is valid or constitutional. Plaintiff Bedingfield must take steps immediately to implement a system to withhold taxes from employees of the City under Ordinance No. 1140. If said Ordinance is not valid, then it would be improper for him to withhold the tax from the many employees of the City. Third, and more importantly, the occupational tax would exacerbate the problems faced by the City of Birmingham, and its residents, in attracting and maintaining jobs, especially in light of the strong competition faced by it from areas such as north Shelby County in attempting to recruit jobs, especially higher paying jobs, from the City of Birmingham and into the suburban area of north Shelby County. The effect of Ordinance 1120 would be not only taking jobs from the City of Birmingham but also to erode the tax base and to otherwise harm the City and the residents of the City of Birmingham.

9. Plaintiffs need an immediate determination and a preliminary injunction against the enforcement of Ordinance No. 1120. Without such a determination and preliminary injunction, plaintiffs would suffer irreparable harm. First, plaintiff Bedingfield and the City of Birmingham will have to incur the cost of establishing and implementing a system to withhold taxes from employees of the City. If the Ordinance No. 1120 is illegal or unconstitutional, then plaintiff Bedingfield and the City of Birmingham would be acting improperly in withholding taxes from employees of the City, and may face claims against them for doing so. If he refuses to withhold, then he faces possible criminal prosecution under §10 of Ordinance No. 1120.

10. Plaintiffs offer to do equity.

CLAIM ONE

10. Paragraphs 1 through 9 are hereby realleged and incorporated herein.

11. Under Art. IV § 44 and Art. XI § 212 of the Constitution of Alabama of 1901, Ordinance No. 1120 is an unconstitutional effort by the Jefferson County Commission to impose a tax upon the citizens of Jefferson County and those working in Jefferson County.

CLAIM TWO

12. Paragraphs 1 through 11 are hereby realleged and incorporated herein.

13. Ordinance No. 1120 is not authorized by Act 406 and is therefore an unauthorized attempt by the Jefferson County Commission to impose a tax upon the citizens of Jefferson County and those working in Jefferson County.

CLAIM THREE

14. Paragraphs 1 through 13 are hereby realleged and incorporated herein.

15. If Ordinance No. 1120 were authorized by Act 406, then Act 406 is unconstitutional based upon any one of the following grounds:

A. Act 406 is unconstitutional local legislation under Article IV, §§ 104(15) and 105 of the Constitution of Alabama of 1901.

B. Act 406 is a violation of the equal protection requirements and provisions of the federal and state constitution.

C. If Act No. 406 were construed to give the defendants the authority to adopt Ordinance No. 1120, then Act 406 is unconstitutional under Article IV, § 45 of the Constitution of Alabama of 1901 because the title of the bill is not sufficiently descriptive to support a comprehensive occupational tax and the title is not consistent with the content of the act.

D. If Act No. 406 were construed to give the defendants the authority to adopt Ordinance No. 1120, then

Act No. 106 is unconstitutional under Article IV, §§ 45 and 71 of the Constitution of Alabama of 1901 in that the law contains more than one subject.

E. Act No. 406 is vague and ambiguous and therefore is a violation of the due process requirements of the state and federal constitution.

WHEREFORE, plaintiffs demand judgment against defendants and request this Court:

A. To declare that Ordinance No. 1120 is void, invalid, and unconstitutional and to issue preliminary and final injunctive relief prohibiting the enforcement of said ordinance;

B. To the extent necessary to declare that Act 406 is invalid, void, and unconstitutional and to issue appropriate injunctive relief prohibiting its enforcement;

C. To issue such other and further relief as may be appropriate and necessary under the circumstances.

[Subscription of Attorney and Jurat Omitted in Printing]

* * * * * * *

IN THE CIRCUIT COURT
FOR
JEFFERSON COUNTY, ALABAMA

CAROLYN PHILLIPS,	)	
JOHN ROGERS,	)	
DALE PATTON	)	
PLAINTIFFS,	)	CASE NO.
	)	CV 87-504-469 JDC
VS.	)	
	)	
THE JEFFERSON COUNTY	)	
COMMISSION	)	
DEFENDANT.	)	

AMENDED AND VERIFIED COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

Filed November 4, 1987

1. This is a suit for declaratory and injunctive relief against the action of the Jefferson County Commission levying an occupational tax on employees of Jefferson County.

PARTIES

2. Plaintiffs Carolyn Phillips, John Rogers, Dale Patton are over the ages of nineteen (19) years, employees within Jefferson County, and reside in Jefferson County, Alabama.

3. Plaintiffs bring this action in their individual capacity.

4. Defendant, the Jefferson County Commission is the County's governing body established pursuant to Federal Decree of 1985 in the case of Taylor, et al. v. Jefferson County Commission and otherwise governed by the general laws of Alabama.

FACTUAL ALLEGATIONS

5. On September 29, 1987, Defendant adopted a resolution levying a county-wide occupational tax to take effect January 1, 1988.

6. Defendant followed Act No. 406 of 1967 State of Alabama as authority to impose said occupational tax.

7. Act No. 406 of 1967 authorizes the governing body of any county of the State having a population of 500,000 or more, according to the last or and subsequent Federal Census, to levy a business or privilege tax upon any business, vocation, occupation, calling or profession for which a license or privilege tax is not required for either the State of Alabama or the county by the laws of the State of Alabama, and to limit the amount of any such business or privilege tax.

8. Act No. 406 of 1967, State of Alabama, was enacted as a general law.

9. Section 110 of the Constitution says: "A general law within the meaning of this Article is a law which applies to the whole state; a local law is a law which applies to any political subdivision or subdivisions of the State less than the whole; a special or private law within the meaning of this Article is one which applies to an individual, association, or corporation."

10. Plaintiffs aver that Act No. 406 of 1967 is not a general law because of its arbitrary classification. For Act No. 406 to be a "general" law, it must have application to a shifting class; there must be a possibility of application to other counties within the classification fixed by the statute. Act No. 406 of 1967 applies ostensibly to Jefferson County and does not apply to any other county in the State of Alabama.

11. Section 106 of the Constitution provides that no local, special, or private law shall be passed on any subject without giving the notice as there prescribed, and makes it the mandatory duty of the Courts to declare the same void if the journals do not affirmatively show that it was passed in accordance with the Section.

12. Act No. 406 of 1967, although passed as a general law under Section 110 of the Constitution, is a local law and is due to be held void on the basis that the journals do not reflect that there was notice of said Act as required by Section 106 of the Constitution of Alabama.

13. Plaintiff avers that Act No. 406 of 1967 is constitutionally offensive because the classification restriction to counties with a population of 500,000 or more residents does not bear a reasonable relationship to the purpose of the law. Such classification is arbitrary and results in a violation of the Constitution of Alabama and of the United States. There is no logical relationship between the population contained in said Act and the purpose as set out in Section One of said Act.

14. Plaintiffs aver that Act No. 406 of 1967 should be declared void for vagueness, inasmuch as its language appears to tax certain persons and not tax others. Equally, said Act contains a reference to establishing as a benchmark the rate of license or privilege tax levied by the largest municipality in the county.

15. Plaintiffs aver that reference to said Act No. 406 of 1967 authorizing the county to levy a business or license fee on those businesses that are not licensed by the county or State shows an intention by the Legislature to avoid other taxes such as the occupational tax the Defendant has adopted to take effect January 1, 1988.

16. Plaintiffs allege that the Defendant is due to be enjoined from levying an occupational tax because said tax, effective January 1, 1988, will subject their wages to confiscation without due process of law as required by the Constitution of Alabama and of the United States.

17. Plaintiffs allege that Act No. 406 of 1967 adopted by the Defendant constitutes a denial of equal protection in violation of the Fourteenth Amendment of the United States Constitution. Said Act exempts professional occupations required by State law to be licensed but does not exempt other professional or nonprofessional occupations.

18. Plaintiffs request an expedited hearing of this matter.

19. Plaintiffs allege that they are entitled to Attorney fees under 42 U.S.C. 1988 with respect to civil rights claims.

WHEREFORE, for the above reasons Plaintiffs pray that this Court will assume jurisdiction and enter a judgment as follows:

1. That this Court award a reasonable Attorney fee to Plaintiff's lawyers as prevailing parties pursuant to 42 U.S.C. 1988.

2. Enter an Order finding that Act No. 406 of 1967 was not intended to authorize Defendant to levy any tax other than on "businesses" that, on its effective date, did not pay a license or privilege tax to the state or county and permanently enjoin Defendant from levying an occupational tax on Plaintiffs.

3. Enter an Order finding that Act No. 406 of 1967 is void on its face by not comporting to the requirements of Section 106 of the Alabama Constitution which requires that the journal of both House and Legislature contain a showing of notice and proof of advertising.

4. Enter an Order finding that the population classification contained in Act No. 406 of 1967 does not bear a reasonable relationship to the purpose of said Act and it therefore a local law void on its face in violation of Section 106 of the Alabama Constitution.

5. Enter an Order finding that Act No. 406 of 1967 violates the due process clause of the Constitution of the United States by denying Plaintiffs their right to equal protection.

6. Enter an Order finding that Act No. 406 of 1967 is void for vagueness and is unconstitutional on its face.

7. Enter an Order granting such other relief as the Court may deem proper.

8. Enter an Order taxing cost against Defendant.

[Subscription of Attorney, Jurat and Certificate of Service Omitted in Printing]

* * * * * * *

IN THE TENTH JUDICIAL CIRCUIT COURT
JEFFERSON COUNTY, ALABAMA
IN EQUITY

HOYT BEDEINGFIELD, JR., et al.,	)	
Plaintiffs,	)	CIVIL ACTION NO.
v.	)	87-504-465 JDC
JEFFERSON COUNTY, ALABAMA, et al.,	)	
Defendants.	)	

CITY PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF LAW ON EQUAL PROTECTION AND ALABAMA CONSTITUTION SECTION 105

The City Plaintiffs' here present argument to supplement that already submitted to the Court by their

PREHEARING MEMORANDUM. The purpose of this memorandum is to focus the Court's attention on the applicability of Alabama Constitution Section 105 and the Equal Protection provisions of the federal and Alabama Constitutions.

The City's argument is two-tiered. Firstly, Act 406 is infirm as an attempt by the legislature to grant special or "local" taxation powers to Jefferson since no rational basis exists for distinguishing Jefferson from other County's within Alabama. Secondly, the above argument is augmented by Section 105 considerations.

We will develop these arguments, in tandem, below.

PEDDYCOART and EQUAL PROTECTION

In the area of statutory grants of authority to municipalities or counties based upon population classifications, there must exist a reasonable relationship between the statute's purpose and the population classification established. If not, the classification will be deemed arbitrary and the statute must fail under Equal Protection scrutiny. *Dearborn v. Johnson*, 234 Ala. 84, 173 So. 864 (1937); *Peddycoart v. City of Birmingham*, 354 So.2d 808, (Ala. 1978).

In our case here, we do not have to surmise about the possible purpose of Act 406, the *purpose* of the act is quite clearly and simply set out in Section 3 of the act, viz:

> "Section 3. The *purpose* of this Act is to *equalize the burden of taxation* by 'authorizing the county to impose a license or privilege tax *upon persons now engaging in certain businesses without paying any license tax thereon* to either the state or county." (emphasis inserted) Act 406 of the 1967 Regular Session of the Alabama Legislature.

Section 4. goes on to identify those "certain businesses".

> "Section 4. The governing body of the county is hereby authorized to levy a license or privilege tax upon any person for engaging in any business for which he is not required by law to pay any license or privilege tax to either the State of Alabama or the county *by any of the following Article 1, Chapter 20 Title 51; Sections 176, 177, 178, 180, 182, 183, 184, 186, 429, and 826 in Title 51 of the Code of Alabama of 1940 as amended.*" (emphasis inserted) Act 406 of the 1967 Regular Session of the Alabama Legislature.

The obvious purpose of the Act was to reach those businesses that were enjoying a "free ride" by operating within Jefferson County with no obligation to pay business license fees. Under the Act, those businesses could be required to assume tax responsibility comparable to other businesses falling subject to license taxation under the "general laws" set forth within Section 4.

The critical determination for this Court is whether the population classification recited in the statute, (i.e, 500,000 or more) bears any relationship to the statute's purpose, and then further, whether that relationship is a reasonable one. *Peddycoart*, supra.

Unmistakably, the statute's emphasis and direction is focused upon *then-unlicensed businesses*. There is no indication that any need for revenue by Jefferson County supplied any part of the legislative motivation.

The analysis, then, for application of Equal Protection, should focus on whether there is a reasonable relationship between taxing previously unlicensed businesses and counties with populations numbering 500,000 or more. We say there is not. There is no articulable distinction, except *bare location* of operation, between unlicensed businesses operating in Jefferson County and those operating in any of the other 66 counties within the state.

For example, Court Reporters are taxed under County Ordinance No. 1 (the 1968 ordinance that implemented

the authority granted under Act 406 (See Richie depo., PX.1)). There is no basis for singling out Court Reporters operating in Jefferson County and subjecting them to additional taxation while their Montgomery County counterparts remain unaffected.

The irrationability of the statute's classification is enhanced by the fact that it does not require those "certain businesses" to do anything, but gives the County the *authority*, exercisable at the discretion of the County's governing body, to levy the tax as it deems appropriate.

SECTION 105 APPLICABILITY

Additionally, the Act violates Section 105 of the Alabama Constitution. That provision prohibits local legislation that invades the province of existing general laws on the subject.

> (N)o . . . local law, . . . shall be enacted in any case which is provided for by a general law, . . . nor shall the legislature indirectly enact any . . . local law by the partial repeal of a general law" Section 105, Alabama Constitution.

Local and general laws are defined in Section 110 of the Alabama Constitution (as last amended by Amendment No. 397)

> "Sec. 110. "General law" "local law" and "special law" defined.
>
> A *general law* is a law which in its terms and effect applies either to the whole state, or to one or more municipalities of the state less than the whole in a class. . . .
>
> A special or private law is one which applies to an individual, association or corporation. A *local law* is a law which is not a general law or a special or private law . . . ". (emphasis inserted)

In *Crandall v. City of Birmingham*, 442 So.2d 77 (Ala. 1983), the Alabama Supreme Court, relying upon the rationale of *Peddycoart*, supra., struck down the City of Birmingham's 90-day claim/notice statute contained in Section 659 of old Title 62, Code of Alabama 1940 (Recompiled 1958), citing that at the time of passage of Section 659, a general law (now Alabama Code Section 11-47-23) "already existed and addressed the same subject" for all Alabama municipalities. *Crandall*, at 80. The Court declared that:

> "We hold that s659, a local law, is unconstitutional under Art. IV, s105, of the Constitution because it was enacted at variance with an already existing general law on the same subject." id. at 80.

Our Act 406 is likewise infirm in that it seeks to cover legislative ground already preempted by a general law. At the time of passage of Act 406 in 1967, there was already in existence a scheme of general laws on the subject of licensing businesses and professions operating within the various counties of Alabama. (ie. Article 1, Chapter 20, Title 51; the predecessor statute to Article 2 of Chapter 12, Title 40 Code of Alabama 1975)

Prior to setting forth, at s41-12-41 *et seq.*, an enumeration of businesses and professions covered, that Article declares:

> *"s40-12-40. Who must procure state and county licenses.*
>
> Every person, firm, company, corporation or association, receiver or trustee, but not a governmental subdivision, engage in any business, vocation, occupation, calling or profession herein enumerated or who shall exercise any privilege hereinafter described for which a license or privilege tax is required shall first procure a state license, and a county license when so required, and shall pay for the same or shall pay for the exercise of such privi-

lege the amounts hereinafter provided, and comply with all other provisions of this title."

The provisions of Title 40, Chapter 12 contain a comprehensive scheme for the license and privilege taxation, by counties and the state, of businesses and professions in Alabama. In fact, Section 40-12-3 requires that any tax collected, where both a county tax and state tax are levied under Article 2, shall be distributed one-half to the county and one-half to the state.

We argue that the Court's task here is completely analogous to the *Crandall* case. Act 406 is unquestionably a "local act" which seeks to establish, in Jefferson County alone, *who must procure a county business license.* In exhaustive and comprehensive fashion, that subject is already covered by general law.

For the foregoing reasons, these plaintiffs urge the Court to find this case indistinguishable from *Peddycoart* and *Crandall* and declare Ordinance 1120 invalid as an unconstitutional exercise of legislative authority.

[Subscription of Attorney and Certificate of Service Omitted in Printing]

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IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

HOIT BEDINGFIELD, JR. and CAROLYN PHILLIPS,	*	
	*	
Plaintiff		
	*	Civil Action Nos. CV-87-504-465 JDC
vs.	*	CV-87-504-469 JDC
JEFFERSON COUNTY COMMISSION,	*	
Defendants.	*	

ORDER

Filed November 23, 1987

It is ORDERED that these actions shall be consolidated; and it is further

ORDERED that all discovery shall be completed not later than November 18, 1987, and that this matter be set for hearing on the merits at 9:00 a.m. on December 2, 1987.

DONE this 18th day of November, 1987.

BRAXTON L. KITTRELL, JR.
Circuit Judge

* * * * * * * *

IN THE CIRCUIT COURT
TENTH JUDICIAL CIRCUIT OF ALABAMA

HOYT BEDINGFIELD, JR., et al.,	)	
	)	
Plaintiffs,	)	
	)	Case No.
vs.	)	87-504-465 JDC
	)	
JEFFERSON COUNTY, ALABAMA, et al.,	)	
	)	
	)	
Defendants.	)	
CAROLYN PHILLIPS, et al.,	)	
	)	
Plaintiffs,	)	
	)	Case No.
vs.	)	CV87-504-469
	)	JDC
THE JEFFERSON COUNTY COMMISSION,	)	
	)	
	)	
Defendants.	)	

ORDER

Filed December 14, 1987

This matter was submitted to the Court on a stipulation of counsel, and testimony heard in open Court at a hearing on the merits.

The Court is faced with two major issues in these lawsuits. First, is Act No. 406, of the 1967 Regular Session of the Legislature of Alabama, constitutional; and second, is Ordinance No. 1120, adopted by the Jefferson County Commission on September 29, 1987, validly authorized by Act No. 406.

Plaintiffs argue that Act No. 406 is unconstitutional as violative of the provisions of the *Constitution of Alabama* of 1901 at Section 104 (15), which bars "local or special legislation regulating the assessment or collection of taxes"; at Section 105, which bars enactment of local laws where a general law exists; at Section 45, which bars legislation containing more than one subject; and at Sections 44 and 212, which bar an unlawful delegation of legislative authority.

The Courts have long held that there is a distinction between the terms "assessment" and "levy" and held that "assessment," as used in Subdivision (15), relates to property taxes rather than privilege taxes. *Opinion of the Justices*, 266 Ala. 363, 369, 96 So.2d 634 (1957) (quoting *Standard Oil Co. vs. Limestone County*, 220 Ala. 231, 234-235, 124 So. 523 (1929). In addition, Act No. 406 authorizes the county governing body to *levy*, not assess, taxes.

The Alabama Supreme Court has interpreted that Section 105 "was not intended to prevent the enactment of a local law on a subject already covered by a general law, when the local law is substantially different from the general law." *Peddycoart vs. City of Birmingham*, 354 So.2d 808, 812 (Ala. 1978). In an explanation of that interpretation, the Court has stated, "Courts are charged with the duty to determine whether there is a substantial difference between the general and local law...." *Peddycoart vs. City of Birmingham*, 354 So.2d 808, 812 (Ala. 1978) (quoting *Standard Oil Co. vs. Limestone County*, 220 Ala. 231, 235, 124 So. 523, 526 (1929). That same Court held:

> "If, in the judgment of the Legislature, local needs demand additional or supplemental laws substantially different from the general law, the Legislature has power to so enact." *Peddycoart vs. City of Birmingham*, 354 So.2d 808, 812 (Ala. 1978) (quoting *Standard Oil Co. vs. Limestone*

County, 220 Ala. 231, 235, 124 So. 523, 526 (1929).

While the *Peddycoart* court eventually overruled all prior interpretations of Section 105 and "prohibited the enactment of a local act when the subject is already subsumed by the general statute", it specifically noted that such new interpretation would be prescriptive, leaving pre-*Peddycoart* legislation under the old interpretations.

Plaintiffs cite Section 40-12-1 *et seq., Code of Alabama* 1975 as a general law governing license taxes, and maintain that this law governs license taxes to be levied by counties. *Code of Alabama* 1975, at Section 40-12-3, allows counties to levy license taxes for *school purposes*. Act No. 406 authorizes the county to levy a license or privilege tax for general county purposes. Statutory construction is subject to the rule that statutes should be construed as a whole to determine legislative intent. *Green v. Fairfield City Bd. of Education*, 365 So.2d 1217 (Civ.App. 1978). Nothing in Section 40-12-1 *et seq* prohibits the legislature from authorizing counties to levy license or privilege taxes for other than school purposes. "Power denied to local governments is reserved to the State Legislature; and subject only to constitutional proscriptions, the legislature is free to determine policy and enact local laws accordingly." *Drummond Co. vs. Boswell*, 346 So.2d 955, 958 (1977). The Court further stated it is not the broad, overall subject matter which is scrutinized to determine whether a local act, taken together with the general law, is violative of constitutional provisions prohibiting enactment of special, private or local laws in any case which is provided for by general law. *Drummond Co.* at 958. Rather, the Court must determine whether the object of the local law is to accomplish an end not substantially provided for and effectuated by general law. *Drummond Co.* at 958. Act No. 406 accomplishes an end not otherwise provided for by Section 40-12-1 *et seq.* and, therefore, is not violative of the constitutional proscription on this ground.

Act No. 406 does not contain, on its face, any provisions relative to enforcement of the other provisions of the act. If it did contain enforcement provisions, such provisions would not necessarily violate the constitutional proscription on multi-subject legislation. The Supreme Court has said that the legislative purpose in requiring single subject legislation is laudatory, but it is met when the separate provisions of a bill germane to the bill's general purpose. *Thomas v. Niemann*, 397 So.2d 90, 93 (1980). Included in the concept of levying a tax and clearly related is the idea that enforcement provisions would follow.

As to the delegation of legislative authority, "the levying of a tax is a purely legislative power, while duties of various officers in relation to assessment and collection of taxes are ministerial and sometimes judicial. *Opinion of the Justices*, 291 Ala. 262, 265, 280 So.2d 97 (1973). A bill authorizing the governing body of any county . . . to levy a privilege tax is not a violation of Section 212 of our Constitution. Id at 266. This Court finds nothing in Act No. 406 which is repugnant to the *Constitution of Alabama* of 1901, and which would invalidate the act. The provisions of Ordinance No. 1120, to the extent that they follow Act No. 406, are likewise valid.

The Court is not persuaded by the plaintiffs' contention that Act No. 406 does not authorize an occupational tax. The Act itself provides that the term "business" includes "business, vocation, occupation, calling or profession", and further provides that the governing body of the county is authorized to levy a license or privilege tax upon any "person" engaging in any business for which he is not required by law to pay any license or privilege tax either to the State of Alabama or the county.

The Court is also not persuaded by the plaintiff's argument that the construction of Act No. 406 prohibits the adoption of Ordinance 1120. As the defendants note in their brief, there is no requirement within Act No. 406 or any other law which requires an immediate "use it or lose it" implementation by the county. The fact that certain officials may have placed a different interpretation upon Act No. 406 will not operate to preclude its implementation by the county.

As Act No. 406 does not authorize portions of Ordinance No. 1120, such as criminal sanctions, reporting requirements, interest and penalties, it would at first appear that those provisions are due to be severed. But the Supreme Court of Alabama, in the case of the *Town of Hackleburg v. Northwest Alabama Gas District*, 277 Ala. 355, 170 So.2d 792 (1965), noted:

> Municipalities have no inherent power of taxation, but the State, having the power to tax may confer and delegate this power on and to a municipality. Stein v. Mayor, etc., of Mobile, 24 Ala. 591; Estes v. City of Gadsden, 266 Ala. 166, 94 So.2d 744. If the taxing power delegated is not limited, it includes all the taxing power possessed by the State. See McQuillin, Municipal Corporation, 3rd Ed., Vol. 16, Sec. 44.07.

The Court finds nothing in Act No. 406 which is repugnant to the *Constitution of Alabama* of 1901 and which invalidates the Act, nor does it find that Ordinance No. 1120 is invalid. The wisdom of and the necessity for this tax are matters for the determination of the county governing body. It has chosen to adopt this tax and this Court finds that its action in so doing is authorized by the constitution and laws of the State of Alabama.

ORDER

Based upon the above and foregoing, the Court ORDERS, DECLARES and DETERMINES that Act No. 406 of the 1967 Regular Session of the Legislature of Alabama, and Ordinance No. 1120 adopted by the Jefferson County Commission on September 29, 1987, are valid and subsisting laws and in full force and effect.

It is further ORDERED that the costs of Court be taxed against the plaintiffs, for the recovery of which let execution issue.

DONE this 11th day of December, 1987.

BRAXTON L. KITTRELL, JR.
Circuit Judge

* * * * * * *

Hoyt BEDINGFIELD, Jr., in his capacity as the acting director of finance of the City of Birmingham, et al.

v.

JEFFERSON COUNTY, et al.

87-316.
Supreme Court of Alabama.
May 20, 1988.

City Challenged constitutionality of county ordinance establishing occupational tax. The Circuit Court, Jefferson County, Braxton L. Kittrell, Jr., J., upheld ordinance, and appeal was taken. The Supreme Court, Beatty, J., held that: (1) statute authorized county to levy occupational tax; (2) statute was general, rather than local legislation; and (3) statute authorizing levy of tax provided for collection of such tax.

Affirmed.

BEATTY, Justice.

This is an appeal by Hoyt Beddingfield, Jr., as acting director of finance of the City of Birmingham, and the City of Birmingham from a judgment upholding a Jefferson County ordinance, specifically Ordinance No. 1120, establishing an occupational tax. We affirm.

The action was filed on October 19, 1987, and was consolidated for trial with the case of *Carolyn Phillips, et at. v. Jefferson County Commission.*

Ordinance No. 1120 levies a license or privilege tax on natural persons engaged in any vocation, occupation, calling, or profession who are not required by law to pay any license or privilege tax to the state or county. This tax was promulgated by Jefferson County under the authority of Act No. 406, approved September 7, 1967, *Acts of Alabama 1967,* at 21-23. Pertinent sections thereof are quoted below:

"AN ACT

"To authorize the governing body of any county of the State having a population of 500,000 or more, according to the last or any subsequent Federal census, to levy a business or privilege tax upon any business, vocation, occupation, calling or profession for which a license or privilege tax is not required for either the State of Alabama or the county by the laws of the State of Alabama, and to limit the amount of any such business or privilege tax.

"Be It Enacted by the Legislature of Alabama:

"Section 1. This Act shall apply to any county of the State of Alabama having a population of 500,000 or more, according to the last or any subsequent federal census, and to no other county.

". . . .

"Section 3. The purpose of this Act is to equalize the burden of taxation by authorizing the county to impose a license or privilege tax upon persons now engaging in certain businesses without paying any license tax thereon to either the state or county.

"Section 4. The governing body of the county is hereby authorized to levy a license or privilege tax upon any person for engaging in any business for which he is not required by law to pay any license or privilege tax to either the State of Alabama or the county by any of the following: Article 1, Chapter 20, Title 51; Sections 176, 177, 178, 180, 182, 183, 184, 186, 429, and 826 in Title 51 of the Code of Alabama of 1940 as amended.

"When a person is engaged in more than one business for one or more of which a license or privilege tax is required to be paid t the State or the county but for one or more of which no license or privilege tax is required to be paid to the State or county, the county governing body shall have the authority to levy a license or privilege tax upon that business, or those businesses, for engaging in which such person is not required to pay any license or privilege tax to the State or county.

"Section 5. The tax hereby levied shall be paid to that officer or employee of the county chargeable with the duty of collecting license or privilege taxes payable to the county.

"Section 6. No license or privilege tax levied by the governing body of the county on any person, for engaging in any business shall be at a rate which is in excess of the rate of license or privilege tax levied by the largest municipality of the county on the same or similar type of business activity."

Allegations of unconstitutionality made below were denied by the defendants. Following discovery, testimony taken in open court, and stipulation, the Jefferson Circuit Court upheld the ordinance, and this appeal followed. Because a number of issues are presented here, we shall treat them *seriatim.*

I.

Did Act No. 406 manifest a legislative intent to authorize Jefferson County to levy an occupational tax?

Plaintiffs' argument here is multifaceted. First, they contend that the stated purpose of the Act is to authorize a tax only upon "certain businesses," and not "occupations." Further, plaintiffs argue that § 6 of Act No. 406 does not permit a privilege tax "which is in excess of the rate of license or privilege tax levied by the largest municipality of the County on the same or similar type of business activity," meaning that Jefferson County could not implement the Act by levying a tax in excess of that which had been levied by Birmingham. Because Birmingham had no such privilege tax in 1967, plaintiffs argue, any county tax under Act No. 406 would offend the Act. Finally, according to plaintiffs, the county's own implementation of the Act when it was enacted in 1967, as only a licensing code authorizing licensing of certain businesses, gives weight to the limiting nature of Act No. 406.

We must respectfully reject these arguments. While we are mindful that taxing statutes are to be strictly construed, *State v. Seals Piano Co.,* 209 Ala. 93, 95 So. 451 (1923), it does not offend that principle to uphold this statute. Indeed, the express language of the Act authorizes the county "to levy a business or privilege tax upon any business, vocation, occupation, calling or profession." When the intention of the legislature is so apparent from the face of a statute that there can be no question as to its meaning, there is no room for construction.

American Institute of Psychotherapy v. Alabama Board of Examiners in Psychology, 410 So.2d 54 (Ala. 1982). Thus, § 4 is to be read as authorizing a privilege tax "upon any person for engaging in any business [or occupation]."

Municipal licensing authority has existed at least since the Code of 1907, see Code of 1975, § 11-51-90. Birmingham originally adopted its licensing code as early as 1916, and in 1967 it had an extensive catalog of business categories subject thereto. However, it was not until 1970 that Birmingham itself adopted Ordinance No. 70-76, providing for a license fee for occupations and professions. Given the fact that Birmingham had possessed the authority under state law to impose an occupational privilege tax since 1907, it is clear that by § 6 of Act No. 406 the legislature, cognizant of that power, decided to restrict the county's authority to a maximum as established by Birmingham's occupational privilege tax. It is a fundamental principle that the legislature, in enacting a statute, is presumed to have full knowledge and information on prior and existing law on the subject of the statute. *Ex parte Love* 513 So.2d 24 (Ala. 1987). Thus, we cannot agree with plaintiffs that Act. No. 406 required Jefferson County to implement its authority contemporaneously thereunder, or lose it altogether. The Act itself contains no such limiting language. True, Jefferson County did not implement the "occupational" aspect of the statute until 1987. Nevertheless, the authority to do so continued.[2]

Finally, we are not persuaded by plaintiffs' argument that, in construing Act No. 406, this Court should defer to the county's alleged contemporaneous interpretation

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[2] By stipulation, it was established that, while Birmingham itself adopted its license code as early as 1916, and possessed an extensive license code in 1967, it did not establish its occupational tax until 1970.

of the Act. Because we do not find the Act doubtful in its meaning, we need not resort to an alleged contemporaneous interpretation by the county.

II.

Is Act No. 406 unconstitutional as violating limitations on local legislation as explained in *Peddycoart v. City of Birmingham*, 354 So.2d 808 (Ala. 1978)?

According to plaintiffs, Act No. 406 violates the mandate of *Peddycoart* in two respects: (1) the general laws of Alabama have preempted the field of license and privilege taxation to prevent reliance upon local legislation, and thus Act No. 406 violates Section 105 of the Constitution; and (2) the population classification of Act No. 406 (500,000 or more), which makes it a "bracket bill," lacks a reasonable relationship with the statute's purpose.

Commenting upon *Peddycoart* in *Freeman v. Purvis*, 400 So.2d 389 (Ala. 1981), this Court stated:

> "We must point out, however, that following the *Peddycoart* decision which was released on January 13, 1978, two amendments to the Alabama Constitution of 1901 were ratified by the people: Amendment No. 375, ratified on November 20, 1978, and Amendment No. 389, ratified on November 4, 1980. Because the latter Amendment is pertinent, we quote it here:
>
> > "Any statute that was otherwise valid and constitutional that was enacted before January 13, 1978, by the legislature of this state and was a general act of local application on a population basis, that applied only to a certain county or counties or a municipality or municipalities of this state, shall not be declared invalid or unconstitutional by any court of this state because it was not properly advertised in compliance with section 106 of this Constitution.

> > "'All such population based acts shall forever apply only to the county or counties or municipality or municipalities to which they applied on January 13, 1978, and no other, despite changes in population.'
> >
> > ". . . .
> >
> > "The effect of this Amendment was to validate all 'bracket bills' enacted without advertising before January 13, 1978, the date of the *Peddycoart* decision, and which were not otherwise unconstitutional . . . ."

Act No. 406 was approved in 1967, well before the date of the *Peddycoart* decision of January 13, 1978, and, as a general law of local application, was validated by Amendment 389 even though it was not advertised under Section 106 of the Constitution of 1901.

Even under pre-*Peddycoart* standards, Act No. 406 must survive a constitutional attack based on a supposed lack of relationship between its purpose and the expressed population classification. As observed in *Dearborn v. Johnson*, 234 Ala. 84, 173 So. 864 (1937), on that subject, much is left to legislative discretion in fixing that classification and in recognizing that purpose. In *Couch v. Rodgers*, 253 Ala. 533, 45 So.2d 699 (1950), this Court reviewed a number of its decisions that had upheld "bracket bills" of substantial minimum, but no maximum, population classifications:

> "We have numerous decisions which give illustration to the principle. We will not undertake to analyze them all, but only such as seem to shed light upon the instant suit. In the case of *Wages v. State*, 225 Ala. 2, 141 So. 707, 708 [1932], this Court was dealing with an act similar to the one here involved. By its terms it had application to counties having a population of three hundred thousand or more according to the last or any subsequent federal census.

The Court there undertook to apply the principle which we have stated above. The act was held to be general, although it then applied only to Jefferson County. We quote from that opinion as follows: 'The wisdom of the law and the necessity for its enactment and the classification adopted were addressed to the lawmaking body. It may be well said, this body understood and appreciated the necessity of furnishing protection to the people in the matter legislated upon in the act, in the larger and more populous counties of the state, which was not necessary or practicable in the smaller counties.'

"We have numerous cases which bring out that application of the principle wherein it was observed that counties of large population may reasonably be supposed to be differently served in many respects than counties of smaller population and there is sometimes drawn a distinction between a classification based upon a minimum population and a classification based upon a population with both a minimum and a maximum limit. The case of *State ex rel. Shirley v. Lutz*, 226 Ala. 497, 147 So. 429 [1933], brings out that distinction. That case was dealing with an act regulating the business of plumbing in counties having a population of 100,000 or more according to the last or any subsequent federal census. The Court emphasized the different principles applicable when there is only a minimum but not a maximum number. When there is only a minimum, the Court thought a more liberal application of the principle should be made.

". . . .

"*In the Opinion of the Justices*, 249 Ala. 511, 31 So.2d 721, we were responding to a legislative inquiry as to a proposed act applicable to counties of 400,000 population or more according to the last or any subsequent federal census, which would require the payment to such counties of a license tax of one cent on each gallon of gasoline. We thought there was a reasonable relation of the subject matter of the Act to counties of such population because we thought that in large counties the load of traffic on the highways by reason of such population justified the legislature in providing additional income in order to take care of its effect."

It is clear from the terms of Act No. 406 that its purpose was to provide more populous counties with a source of revenue by authorizing them to impose a privilege or license tax. The record establishes, if common sense does not, that needs and demands for services made upon county governments keep pace with urbanization and increases in population, necessitating new opportunities for revenue. It follows that populous counties experience greater demands for costly services than those sparsely populated. In this case, therefore, the requisite relationship was established. *Peddycoart, supra.*

Is Act No. 406 unconstitutional under § 105, Constitution of 1901?

Plaintiffs maintain that Act No. 406 is constitutional under Section 105, Constitutional of 1901. The pertinent part of that section states that "[n]o special, private, or local law . . . shall be enacted in any case which is provided for by a general law." Plaintiffs reason that Act No. 406 is infirm under that provision because of the prior enactment of Article I, Chapter 20, Title 51, Code of 1940, now Article II, Chapter 12, Title 40, Code of 1975, which provides:

"Every person, firm, company, corporation or association, receiver or trustee, but not a governmental subdivision, engaged in any business, vocation, occupation, calling or profession herein enumerated or who shall exercise any privilege hereinafter described for which a license or privilege tax is re-

> quired shall first procure a state license, and a county license when so required, and shall pay for the same or shall pay for the exercise of such privilege the amounts hereinafter provided, and comply with all other provisions of this title."

Section 40-12-40, Code of 1975.

Act No. 406, as we have stated, is a general law, not a local law; thus Section 105 is inapplicable.

III.

Finally, plaintiffs contend that Act No. 406 fails for want of an express provision therein for the collection of an occupational tax. Plaintiffs argue further that a reading of Act No. 406 to so provide would violate Section 104(15) of the Constitution of 1901, which prohibits the enactment of a local law "[r]egulating either the assessment or collection of taxes."

For the reasons previously discussed, Act No. 406 is a general, not a local, law; hence, this provision, Section 104(15), is inapplicable. And, as the trial court found:

> "The Courts have long held that there is a distinction between the terms 'assessment' and 'levy' and held that 'assessment,' as used in Subdivision (15), relates to property taxes rather than privilege taxes. *Opinion of the Justices,* 266 Ala. 363, 369, 96 So.2d 634 (1957) (quoting *Standard Oil Co. v. Limestone County,* 220 Ala. 231, 234-235, 124 So. 523 (1929)."

Moreover, the grant of authority to "levy a license or privilege tax upon any person" in § 4 of Act No. 406 was in itself authority to collect such a tax. Cf., *Syracuse Trust Co. v. Board of Supervisors,* 13 N.Y.S.2d 390 (Sup.Ct.), *affirmed,* 258 A.D. 17, 15 N.Y.S.2d 920 (1939); to "levy" is to "collect" a tax. *Black's Law Dictionary* (5th ed. 1979) at 816.

Let the judgment be affirmed.

AFFIRMED.

TORBERT, C.J., and MADDOX, JONES, ALMON, SHORES and ADAMS, JJ., concur.

* * * * * * *

MOTION TO STRIKE

Filed November 2, 1992

[Caption Omitted in Printing]

COME NOW the Defendants, Jefferson County, Alabama and Randy Godeke, and hereby move this Court to strike the affidavits of Braxton Kittrell, William Acker, Sara Tackett and Fannie Hill which were submitted by Plaintiffs in response to the County's MOTION FOR SUMMARY JUDGMENT. In further support of this motion, Defendants state as follows:

1. AFFIDAVIT OF BRAXTON KITTRELL

The contents of Judge Kittrell's affidavit are immaterial to the issue of res judicata. The test is *not* whether the federal constitutional claims *were* adjudicated by Judge Kittrell, rather the test is whether the federal constitutional claims **could have been** adjudicated. *Baker v. City of Guntersville,* 600 So.2d 280 (Ala. Civ. App. 1992); *Dairyland Insurance Company v. Jackson,* 566 So.2d 723 (Ala. 1990); *NAACP v. Hunt,* 891 F.2d 1555 (11th Cir. 1990). As discussed in the County's MOTION FOR SUMMARY JUDGMENT, res judicata bars not only the precise legal theories adjudicated in the prior case, but *all legal theories and claims arising out of the same nucleus of operative fact.* The federal constitutional claims in the instant suit clearly arise out of the same nucleus of operative fact as

those presented in *Bedingfield*. Thus, said claims are barred regardless of whether they were properly presented, briefed and argued by the *Bedingfield* plaintiffs *or* adjudicated by Judge Kittrell.

Moreover, the law is well settled that a trial judge's failure to rule on a claim operates as a *denial* of that claim. *McClure v. Moore,* 565 So.2d 8 (Ala. 1990). The *Bedingfield* complaints and amended complaints (collectively attached to the MOTION FOR SUMMARY JUDGMENT as Exhibit B) contain numerous allegations pursuant to the United States Constitution, federal civil rights laws and state law. Thus, by operation of law, Judge Kittrell's failure to rule on the federal claims amounts to a denial of those claims.

Further, regardless of Judge Kittrell's order, the Alabama Supreme Court dealt squarely with the Federal Equal Protection argument as it was framed in *Bedingfield's* appellate brief. In that brief (attached to the County's MOTION FOR SUMMARY JUDGMENT as Exhibit D1-6), *Bedingfield's* attorneys denominated their equal protection argument as issue II-B:

> "[d]oes Act No. 406 and the occupational tax adopted by Jefferson County comply with principles of equal protection?"

The corresponding Argument portion of the *Bedingfield* brief (attached to the County's MOTION FOR SUMMARY JUDGMENT as Exhibit D4-5) asserted that Act No. 406 violated the Equal Protection clause in that there was no reasonable relationship between the statute's purpose and the population classification. The *Bedingfield* brief took its argument from *Peddycoart v. City of Birmingham,* 354 So.2d 808 (Ala. 1979) (attached hereto), in which the Supreme Court determined that a 1915 population classification act which conferred immunity upon all cities with a population of more than 100,000 violated

the *Equal Protection clause of the U.S. Constitution* because the statute's purpose was *not* reasonably related to the population classification therein.

At page 1272 of the *Bedingfield* opinion, Justice Beatty (also the author of *Peddycoart*) reprinted the issue as set forth in *Bedingfield's* brief and denominated it as Issue II-(2). He then devoted nearly two pages of the opinion to a discussion of *Peddycoart* and concluded at page 1274 that the purpose of Act No. 406 *was reasonably related* to the population classification:

> "It is clear from the terms of Act No. 406 that its purpose was to provide more populous counties with a source of revenue by authorizing them to impose a privilege or license tax. The record establishes, if common sense does not, that needs and demands for services made upon county government keep pace with urbanization and increases in population, necessitating new opportunities for revenue. It follows that populous counties experience greater demands for costly services than those sparsely populated. In this case, therefore, the requisite relationship was established. *Peddycoart, supra.*"

527 So.2d at 1274.

Thus, regardless of Judge Kittrell's order, it is clear that the Federal Constitutional Challenges to the occupational tax were **HEARD** and **REJECTED** by the Alabama Supreme Court in the *Bedingfield* case. For these reasons, Judge Kittrell's affidavit *adds nothing* to the res judicata analysis and is due to be stricken as immaterial.

2. AFFIDAVIT OF WILLIAM ACKER.

The affidavit of William Acker also adds nothing to the res judicata analysis. The affidavit merely asserts that Judge Acker intends to force the County to sue him to collect the tax. It is more significant that William Acker

and *all* other active Federal Judges of the Northern District of Alabama and *all* of the other federal employees have paid and continue to pay *without challenge* the City of Birmingham Occupational Tax (measured at 1% of gross receipts) since its enactment in 1970!!!

3. AFFIDAVIT OF SARA TACKETT.

The affidavit of Ms. Tackett, office manager for Plaintiffs' lawyers, is due to be stricken for several reasons. First, it adds absolutely nothing to the res judicata analysis. Second, it contains *untrue* assertions to the effect that Jason Richards, a courier, pays in excess of $300 in County Occupational Tax on a $6,000 annual salary while, at the same time, the attorneys Baxley and Dillard pay no occupational tax on salaries of hundreds of thousands of dollars. Ms. Tackett's statement are misleading, her arithmetic is erroneous and she fails to disclose that the lawyers in her firm are paying thousands of dollars each year in occupational taxes to the City of Birmingham and to the State of Alabama.

Act No. 406 states, on its face, that its purpose is to *"equalize the burden of taxation"* by imposing a County Occupational Tax on individuals who work in the County and who do not already pay occupational tax to the State. Section 3, Act 406 (attached to County's MOTION FOR SUMMARY JUDGMENT as Exhibit F). Thus, individuals (such as practicing attorneys Bill Baxley and Joel Dillard) who are required by State law to pay the State Occupational License are exempt from the County tax. Section 4, Act No. 406. Further, Act No. 406 expressly recognizes that many of the prospective taxpayers would also be required to pay the Birmingham Occupational Tax. Therefore, Act No. 406 prohibits the rate of the County tax from exceeding the occupational tax rate of Birmingham. Section 6, Act 406.

As set forth in the attached affidavit of Randy Godeke, Director of Revenue, Jefferson County, Alabama, the *true* calculation of occupational taxes for Jason Richards and Bill Baxley on income earned in the City of Birmingham are as follows:

JASON RICHARDS — 1991 EARNINGS —	$	6,269.00
A. State Occupational —		-0-
B. County Occupational (.005)	$	31.35
C. City Occupational (.01) —	$	62.69
TOTAL	$	94.04
BILL BAXLEY — 1991 EARNINGS —	$	388,371.00
A. State Occupational	$	151.25
B. County Occupational		-0-
C. City Occupational (.01)	$	3,883.00
TOTAL	$	4,034.25

Thus, the statement and calculations contained in the Tackett affidavit are complete fabrication. As they serve no purpose, other than to inflame and mislead the reader, they are due to be stricken.

4. AFFIDAVIT OF FANNIE HILL.

The County occupational tax (and the Birmingham occupational tax) exempts domestic servants. The term "domestic servant" is defined by Black's Law Dictionary as follows:

> "A domestic, or, in full, domestic servant, is a servant who resides in the same house with the master. The term does not extend to workmen or laborers employed out of doors."

Id.

In her affidavit, Ms. Hill erroneously describes herself as a "domestic servant in commercial settings". There is no such thing. Her own affidavit establishes that she is a

full-time professional janitor employed by a commercial contract janitorial company, *not* a domestic servant. Interestingly, she fails to state that she continues to pay, without challenge, the Birmingham occupational tax.

Ms. Hill's affidavit adds nothing to the res judicata analysis and is, therefore, due to be sticken.

CONCLUSION

In its MOTION FOR SUMMARY JUDGMENT, the County has demonstrated that the doctrine of res judicata bars *all* of the claims raised by the Plaintiffs in the instant suit. Specifically, the County has demonstrated that:

1. The *Bedingfield* opinion is a prior judgment on the merits; and

2. The Alabama Supreme Court is a court of competent jurisdiction; and

3. Substantial identity of parties exists between current and former Plaintiffs in that, under the test set forth by the Alabama Supreme Court, former and current Plaintiffs are in privity with one another because their interests, rights, motivations and goals are *identical* and because current Plaintiffs would have been protected from payment of the tax had the *Bedingfield* court invalidated the tax; and,

4. The causes of action in the instant suit are substantially the same as those which were or could have been presented in *Bedingfield* because they all clearly arise out of the same nucleus of operative fact. That is, the facts have not changed; the evidence has not changed; the remedies have not changed; and the tax itself has not changed.

The affidavits of Braxton Kittrell, William Acker, Sara Tackett, and Fannie Hill are wholly immaterial to the issue of res judicata and are, therefore, due to be

stricken. Further, this suit is clearly barred by the doctrine of res judicata and the County should not be put to the burden and expense of having to relitigate the constitutionality of its occupational tax. The County is due the entry of summary judgment in its favor without further delay.

[Subscription of Attorney and Certificate of Service Omitted in Printing]

AFFIDAVIT

Before me, the undersigned Notary Public in and for said County and State, personally appeared Randy Godeke, who being known to me and being first duly sworn, states on oath as follows:

> My name is Randy Godeke, I am the Director of Revenue for Jefferson County, Alabama. I am over the age of twenty-one (21) and have personal knowledge of the facts set forth herein.
>
> I have reviewed the affidavit of Sara Tackett which was provided to me by the Jefferson County's Attorney's office. In her affidavit, Ms. Tackett incorrectly states the amount of County Occupational Tax owed by Jason Richards. Further, Ms. Tackett fails to state the other occupational taxes which would be owed by both Mr. Richards and the lawyers in their firm.
>
> Assuming that Jason Richards earned $6,269.00 in 1991 in Birmingham, Alabama, he would owe occupational taxes as follows:

A.	State Occupational —	-0-
B.	County Occupational (.005) —	$31.35
C.	City Occupational (.01) —	$62.69
	TOTAL	$94.04

Assuming that Mr. Baxley earned $388,371.00 in 1991 in Birmingham, Alabama, he would owe occupational taxes as follows:

A. State Occupational	$ 151.25
B. County Occupational	-0-
C. City Occupational (.01)	$3,883.00
TOTAL	$4,034.25

/s/ Randy Godeke
Randy Godeke

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NOTICE OF FILING AFFIDAVITS IN SUPPORT OF CONDITIONAL CERTIFICATION OF CLASS AND SUB-CLASSES, AND IN OPPOSITION TO SUMMARY JUDGMENT

Filed March 2, 1993

[Caption Omitted in Printing]

Come plaintiffs and file with the Court certified copies of an Order, Defendant's First Set of Interrogatories to Plaintiff, and the affidavit of Defendant Randy Godeke in response thereto from a parallel pending federal action, Jefferson County v. Acker, CV 93-U-0069-S.

[Subscription of Attorney and Certificate of Service Omitted in Printing]

* * * * * * *

ORDER

Entered February 25, 1993

[Caption Omitted in Printing]

The above-captioned cases were filed in the District Court of Jefferson County, Alabama, seeking to recover taxes allegedly due by defendants pursuant to Jefferson County Ordinance 1120, and each was removed to this Court. They are now before the Court on motions to remand and to consolidate.

The above cases were removed to this Court pursuant to 28 U.S.C. § 1442 (a)(1), (3) which provides in pertinent part:

> (a) a civil action . . . commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Any officer of the United States . . . for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue . . .
>
> (3) Any officer of the courts of the United States, for any act under color of office or in the performance of his duties.

Petitioners, Unites States district judges, are officers of the United States and of the courts of the United States. Jefferson County claims that, pursuant to ordinance 1120, each defendant owes Jefferson County in taxes a percentage of each defendant's gross salary from the United States for the applicable period.

Jefferson County's ordinance No. 1120, upon which the original complaint are based, provides in part:

> It shall be unlawfull for any person to engage in or follow any vocation, occupation, calling or profession . . . without paying license fees for

the privilege of engaging in a following such vocations, occupation, calling or profession . . .

The ordinance therefore clearly implicates defendants' acts under color of office as United States district judges with respect to both civil and criminal matters — indeed every judicial act performed by them. Since the removed actions involve claimed delinquent taxes, the ordinance purports to say that such acts were unlawfully performed by defendants.

Claimant Jefferson County urges that the cases be remanded on the ground that this Court has no subject matter jurisdiction, citing the Tax Injunction Act, 28 U.S.C. § 1341 and the Buck Act, 4 U.S.C. § 106(a). But this Court has, pursuant to 28 U.S.C. § 1442, at least the same jurisdiction as that possessed by the District Court of Jefferson County. *Pennsylvania Turnpike Commission v. McGinnes*, 179 F. Supp. 578, 580 (D.C. Pa, 1959), affirmed 278 F. 2d 330, *cert. den*, 364 U.S. 820. The defendants have sought no relief other than that which would appear to be within the jurisdiction of the District Court of Jefferson County Alabama. There are numerous cases to the effect that 28 U.S.C. § 1442 shall be given a liberal construction. The motions to remand are therefore DENIED.

The motion to consolidate the two above captioned cases is unopposed, the cases present identical questions of fact and law, and this Court finds consolidation appropriate, and grants the motion to consolidate.

SO ORDERED, this 23 day of February, 1993.

CHARLES A. MOYE, JR.
UNITED STATES DISTRICT JUDGE

****

DEFENDANT'S FIRST SET OF INTERROGATORIES TO PLAINTIFF

[Caption Omitted in Printing]

Pursuant to Rule 26, F.R.Civ.P., William M. Acker, Jr., defendant in the above-entitled cause, propounds the following interrogatories to plaintiff, Jefferson County, a political subdivision of the State of Alabama.

1. Does Jefferson County's Ordinance No. 1120, as predicted in its preamble, "establish a license or privilege tax" on persons engaged in Jefferson County in certain vocations, occupations, callings and professions, to the exclusion of other persons engaged in Jefferson County in other vocations, occupations, callings and professions?

2. Inasmuch as Ordinance No. 1120 uses the phrases "occupational tax", "privilege tax" and "license fee" interchangeably, are the phrases intended as synonyms?

3. What are the differences, if any, between a "license fee," an "occupational tax" and a "privilege tax"?

4. Do persons engaged in the following businesses, vocations, occupations, callings and professions enjoy an exemption from the obligation to "pay a license fee under this ordinance" as provided in the definition of "license" contained in Section 1(G) of Ordinance No. 1120:

(a) Lawyers in private practice.

(b) Lawyers who work as salaried employees for public entities or business entities but who hold licenses to practice law in the State of Alabama.

(c) Stockbrokers even though affiliated with a brokerage firm.

(d) Physicians in private practice.

(e) Physicians who work as salaried employees for public entities or business entities but who hold Alabama licenses to practice medicine.

(f) Veterinarians.

(g) Pharmacists.

(h) Chiropractors.

(i) Naturopaths.

(j) Podiatrists.

(k) Osteopaths.

(l) Registered nurses.

(m) Licensed practical nurses.

(n) Engineers in private practice.

(o) Engineers who work as salaried employees for public entities or business entities but who hold Alabama engineering licenses.

(p) Architects.

(q) Real estate agents.

(r) Real estate brokers.

(s) Insurance agents.

(t) Insurance agents who work as salaried employees for public entities or business entities but who hold Alabama real estate licenses.

(u) Insurance brokers.

5. List all occupations not named in response to No. 4 and which require a license from the State of Alabama and are therefore excluded from the requirements of Ordinance No. 1120.

6. List all occupations not named in response to No. 4 and which require a license from Jefferson County and therefore are excluded from the requirements of Ordinance No. 1120.

7. Have Alabama's two United States senators, both of whom have offices located in Jefferson County, ever paid a license fee or any portion of their legislative salaries to Jefferson County pursuant to Ordinance No. 1120?

8. Have either the Jefferson County Attorney or any member(s) of his staff of attorneys ever paid a license fee

or any portion of their salaries to Jefferson County pursuant to Ordinance No. 1120?

9. Has any United States Tax Court judge, who sits in Jefferson County from time to time, ever paid any occupational tax to Jefferson County pursuant to Ordinance No. 1120?

10. Has any United States Courts of Appeals judge (in particular Hon. Robert S. Vance), who sits in Jefferson County from time to time, ever paid any occupational tax to Jefferson County pursuant to Ordinance No. 1120?

11. Have any entertainers or artists who have performed in one-time concerts or events in Jefferson County ever paid the license fee or any portion thereof pursuant to Ordinance No. 1120?

12. Have all members of the Armed Forces of the United States who reside in and perform services in Jefferson County paid the license fee or any portion thereof pursuant to Ordinance No. 1120?

13. Will the federal judge who is specially appointed or designated to sit in this case because of the recusal of all regular judges of this court be subject to Jefferson County's so-called occupational tax upon a portion of his or her income earned from judicial services performed in this case while in Jefferson County? (This defendant expressly waives the venue or territorial jurisdictional requirement that this case proceed in the Southern Division of this court in order to obviate any problems inherent in this question.)

14. Since the enactment of Ordinance No. 1120, has Jefferson County made any demand or demands on persons not residents of Jefferson County, or on their employers who are located in Jefferson County, for payment of the license fee or occupational tax pursuant to Ordinance No. 1120?

15. If the answer to No. 14 is affirmative, name all such persons and employers, giving their residence and business addresses, when and how each demand was made, whether or not there was compliance after demand, and whether or not a suit has been filed or an arrest made in the event of non-compliance.

16. After January 1, 1988, how many people have been audited by Jefferson County on a suspicion or belief by Jefferson County that a higher percentage of their annual income was earned in Jefferson County than was claimed by the licensee?

17. Is it routine that a licensee under Ordinance No. 1120 pay one-half of one percent of all of his or her income to Jefferson County no matter what percentage of his or her income was earned in Jefferson County and thereafter to file a verified claim for a refund, or is the licensee routinely allowed to estimate in advance the percentage of his or her income expected to be earned in Jefferson County and to pay only the percentage of a full license fee reflected by that estimate, subject to later amendment and audit?

18. State the words of the oath or oaths required of licensees and of employers pursuant to Ordinance No. 1120?

19. Are the penalties for false swearing under the required oath the same penalties as for perjury under the criminal statutes of Alabama?

20. Does Ordinance No. 1120 constitute an "income tax" in any sense?

21. If the answer to No. 20 above is affirmative, explain in detail how and under what circumstances Ordinance No. 1120 constitutes an "income tax."

22. Has Jefferson County ever filed a claim in the Federal Claims Court, or any other court, against the United States or against any agency of the United States as an

employer of a person or persons subject to withholding under Ordinance No. 1120 as a result of the employer's not withholding payment from its employee or employees as required by Ordinance No. 1120?

23. If the answer to No. 22 is negative, why has Jefferson County never filed such a claim or suit?

24. State the rationale, if there is a rationale, for the exemption of domestic servants, no matter what the amount of their income earned in Jefferson County, from the license fee in Ordinance No. 1120.

25. Was a reason for calling Ordinance No. 1120 an "occupational tax" or a "privilege tax" or a "license fee" the prohibition of Alabama law against Jefferson County's levying an income tax?

26. If the answer to No. 25 is negative, state the rationale for carefully never referring to tax based exclusively on a percent of income as an "income tax"?

27. Does Jefferson County concede that, with proper legislative authority from the Alabama Legislature, all 31 counties in the Northern District of Alabama could adopt ordinances similar to Ordinance No. 1120, thus obligating a federal judge who sits in all 31 counties to pay a portion of his or her income to each and all of the 31 counties?

28. If the answer to No. 27 is negative, why would it not be possible?

29. Why is Jefferson County's so-called "occupational tax" or "privilege tax" or "license fee" markedly different from the similar tax levied by the City of Birmingham, particularly in that the City's ordinance contains no exceptions for persons holding other licenses and treats all taxpayers alike?

30. Does Jefferson County consider it fair and equitable and equal treatment for a lawyer who practices law only in Jefferson County and who earns one million dol-

lars a year to be entitled to perform such professional services in Jefferson County for a license fee of $200.00 per year paid to the State (only a portion of which goes to Jefferson County), while a federal judge who earns approximately $133,000 per year and who performs services in 31 counties, must, in order lawfully to perform his duties, pay a license fee of approximately $665.00 per year to Jefferson County alone for the privilege of having his main office in Jefferson County (one of the 31 counties he or she serves), a location chosen not by him or her but by the United States?

31. Now that Section 104 of the Federal Courts Administration Act of 1992 (Public Law 102-572), which amended 28 U.S.C. § 291(c), allows federal district judges to be reassigned outside their districts, if the Northern District of Alabama successfully requests the assignment here of a district judge from another district for conducting a long trial or trials because of an unmanageable case load in the Northern District of Alabama, will he or she be deemed subject to Ordinance No. 1120 while situated temporarily in Jefferson County?

32. State all reasons why Jefferson County attempted during the legislative year 1991, by having H.R. 527 introduced, to amend Act No. 406, adopted by the 1967 Alabama Legislature and upon which Ordinance No. 1120 is based?

33. Was one reason Jefferson County proposed an amendment to Act No. 406 its doubts or worries about the constitutionality or legality of Ordinance No. 1120?

34. Explain precisely how the fee, penalties and attorney's fees alleged in the instant complaint were calculated.

35. How many employees of the United States or agencies of the United States does Jefferson County claim to have been delinquent or not properly licensed under Ordinance No. 1120 prior to the first collection suit's having been filed by Jefferson County?

36. Does a United States district judge who has an office and courtroom in the same federal courthouse in which this defendant has his office and courtroom and who has periodic responsibility for trying cases in Jefferson County, but whose permanent assignment and chambers within the Northern District of Alabama is in Madison County, Alabama, owe the occupational license or any portion thereof to Jefferson County?

37. Would an honestly held belief that Ordinance No. 1120 is unconstitutional or illegal in its application to a particular individual constitute a sufficient reason for Jefferson County's waiving penalty and/or interest under the provision of the ordinance which allows such a waiver if "a good and sufficient reason is shown for the failure to pay the tax within the time required"?

38. If the answer to No. 37 is negative, list all "good and sufficient reasons" for such a waiver of penalty and/or interest, that is unless the Director of Revenue has total discretion in the matter.

39. What Alabama statute of limitations bars a claim for an unpaid license fee under Ordinance No. 1120?

40. What is the maximum punishment that can be imposed upon a person convicted under Ordinance No. 1120 (refer in particular to the statutory basis)?

41. What is the statute of limitations for a criminal prosecution for an alleged violation of Ordinance No. 1120 (refer in particular to the statutory basis)?

WILLIAM M. ACKER, JR.
Defendant
Pro se
481 U. S. Courthouse

[Certificate of Service Omitted in Printing]

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ANSWERS TO INTERROGATORIES

[Caption Omitted in Printing]

1. Jefferson County Ordinance 1120 levies a license or privilege tax upon persons engaged in any vocation, occupation, calling or profession in Jefferson County who are not required by law to pay license or privilege tax to the State for the particular business. The Ordinance is authorized by Alabama Act No. 406, Legislature of Alabama 1967 (herein "Act No. 406") which provides in part:

> Section 3. The purpose of this Act is to equalize the burden of taxation by authorizing the county to impose a license or privilege tax upon persons now engaging in certain businesses without paying any license tax thereon to either the state or county.

2. The terms appear to be synonymous as used in the Ordinance and the Act.

3. None, as those terms are used in the Ordinance and the Act.

4. Section 4 of Act No. 406 authorizes the governing body of the County "to levy a license or privilege tax upon any person for engaging in any business for which he is not required by law to pay any license or privilege tax to either the State of Alabama or the County" by the State License Code. The State License Code is chiefly set out at Chapter 12, Title 40, Code of Alabama (1975). Accordingly, for each occupation questioned in Interrogatory 4 (a) - (u) reference must be made to the State License Code. If the subject occupation is included therein, and the individual is "required by law" to procure the State License Code license for the individuals' specific "business" then that individuals' specific "business" is exempted from the license or privilege tax established by Act No. 406. Following herewith are citations to the State License Code which appear to coincide with the occupations which Interrogatory 4 identifies. Each individual's business must be examined in light of the express provisions of the State License Code to determine if it is covered thereby. (The mere fact that an individual purchases a State license does not provide an automatic exemption from the County tax.)

a. See § 40-12-49.

b. Depends upon whether lawyer is required to purchase State license in accordance with § 40-12-49.

c. See § 40-12-162.

d. See § 40-12-126.

e. Depends upon whether physician is required to purchase State license in accordance with § 40-12-126.

f. See § 40-12-178.

g. No license required by Title 40. However, pharmacists must purchase a County license. See § 34, Ordinance 1172.

h. See § 40-12-136.

i. See § 40-12-155.

j. See § 40-12-126.

k. See § 40-12-136.

l. No license required by Title 40.

m. No license required by Title 40.

n. See § 40-12-99.

o. Depends on whether the engineer is required to purchase State license in accordance with § 40-12-99.

p. See § 40-12-48.

q. See § 40-12-149.

r. No license required by Title 40. However, real estate salesmen must purchase County license. See § 89, Ordinance 1172.

s. No license required by Title 40. However, insurance agents must purchase County license. See § 90, Ordinance 1172.

t. I do not understand this question.

u. No license required by Title 40. However, insurance agents must purchase County license. See § 90, Ordinance 1172.

5. Objection. Plaintiff objects to listing every conceivable occupation. The information sought by this Interrogatory is equally available to the Defendant by reference to Act No. 406 and the State License Code.

6. Objection. Plaintiff objects to listing every conceivable occupation. The information sought by this Interrogatory is equally available to the Defendant by reference to Act No. 406, the License Code of Jefferson County (Ordinance No. 1172) and the State License Code.

7. The individuals who actually work in the offices of the United State Senators located in Jefferson County are subject to and pay the Jefferson County Occupational Tax on the portion of their earnings reported to be earned in Jefferson County. The Senators have not reported any earnings in Jefferson County.

8. The Jefferson County Staff Attorneys are required by State law to pay their license or privilege tax to the State. Accordingly, Act No. 406 does not authorize the County to tax their earnings. However, they are subject to the City of Birmingham Occupational Tax of 1 percent of their earnings.

9. I do not know any such judges. However, any such judges would be subject to the Jefferson County Occupational Tax on the portion of their earnings earned in Jefferson County (and the Birmingham Occupational Tax on the portion of their earnings earned in Birmingham).

10. I do not know any such judges. However, any such judges would be subject to the Jefferson County Occupational Tax on the portion of their earnings earned in Jefferson County (and the Birmingham Occupational Tax on the portion of their earnings earned in Birmingham). A dialogue was in process with Judge Robert Vance concerning the tax at the time of his death.

11. These individuals are required by State law to pay license or privilege tax to the State and are, therefore, exempt from the County occupational tax.

12. Members of the armed forces of the United States are subject to Jefferson County Occupational Tax on the portion of their earnings earned in Jefferson County.

13. It is my understanding that the Federal Judge assigned to this case is in senior status. If that is correct, he would not owe occupational tax to Jefferson County.

14. Yes.

15. Objection. Jefferson County has filed approximately 4,400 civil lawsuits against delinquent occupational taxpayers. The information concerning these suits is equally available to Defendant by inspection of the District Court records of Jefferson County, Alabama. Further, some of the information requested by Interrogatory 15 may be confidential pursuant to Section 9, Ordinance 1120. No one has been arrested.

16. In excess of 15,000 individual tax accounts have been examined to date to determine whether the proper amount of occupational tax has been paid.

17. The taxpayers who earn *part* of their wages in Jefferson County, Alabama, have the option of paying the tax on their full wages and later seeking the appropriate refund or, paying tax on the estimated amount of income they earn in Jefferson County, Alabama. The Department of Revenue has adopted a procedure to obtain a written estimate from the taxpayer.

18. No oaths are required of Jefferson County occupational taxpayers.

19. There are no required oaths.

20 - 21. Ordinance 1120 is not an "income tax" under Alabama law. However, with regard to federal employees, the Buck Act, 4 U.S.C. § 110(c) defines "income tax" as any tax levied on or measured by net income, gross income or gross receipts. The Buck Act makes all such state and local taxes applicable to federal employees.

22 - 23. Jefferson County had made efforts to obtain the voluntary cooperation of several agencies of the United States to implement the withholding of the Jefferson County Occupational Tax. Only two United States agencies have failed to initiate withholding at this time. As time and resources permit, other efforts will be pursued.

24. I do not know what was in the minds of the County Commissioners in 1987 when the Ordinance was adopted concerning exempting "domestic employees employed in private homes". However, the County Occupational Ordinance is very close to the City of Birmingham Occupational Ordinance which had been in place for 17 years before the County Ordinance was adopted and which also exempted such domestic servants employed in private homes. Further, it is apparent that performing domestic services in private homes does not carry the usual commercial concepts applicable to commercial suppliers of goods and services.

25. The terms identified at interrogatory no. 25 are used in accordance with the enabling legislation, Act No. 406 (1967).

26. See answer 25 above.

27 - 28. Jefferson County acknowledges that the State Legislature has the power to impose revenue taxes upon individuals with earnings from services provided within

the State. Further, that the State legislature has the power to delegate authority to counties and to municipalities to impose revenue taxes on the earnings of individuals performing services within those respective jurisdictions. Businesses routinely pay such revenue taxes to multiple taxing jurisdictions in which they conduct business. All municipalities in Alabama are already authorized to impose such business revenue taxes on earnings occurring within their jurisdictions.

29. It appears that in 1970 the City of Birmingham exercised its authority in full (except as to domestic servants employed in the home) as delegated to it by the Alabama Legislature by imposing its occupational tax on all occupations. It appears that Jefferson County exercised its authority in full (except as to domestic servants employed in the home) as delegated to it by the Alabama Legislature by imposing its occupational tax on all occupations that are not included in the State License Code. It also appears that the Alabama Legislature elected to subordinate the taxing authority which it delegated to Jefferson County to its own exercise of taxing authority through the State License Code.

30. Object. This interrogatory is argumentative. Nevertheless, it is noted that the argument is specious and implausible as demonstrated by substituting other taxing authorities. That is, does the Defendant likewise refuse to pay State of Alabama income tax and the City of Birmingham occupational tax because other federal judges located in states and municipalities without income tax and without privilege taxes do not have to pay similar taxes? The Defendant's argument is no different than an argument that might be raised by any employee of an employer (other than the United States) which directs an employee to work within an assigned territory. Probably very few such employee tax payers have the choice of which jurisdiction they will perform their services in.

31. Alabama income tax and municipal and county occupational taxes are imposed on earnings earned within the respective jurisdiction. The United States Congress is fully aware of the authority of state and municipal and county jurisdictions to impose revenue taxes on the earnings of members of the federal judiciary which occur within the jurisdictions. The United States Congress expressly declared in "The Buck Act" that such earnings are subject to such state and local revenue taxes and further are subject to withholding by the United States and its agencies. Neither the United States Congress nor the Alabama Legislature made any exception from their acts for members of the federal judiciary or other federal employees by reason of being "situated temporarily" within any such jurisdiction.

32. The bills referred to Interrogatory 32 would broaden the tax base and increase revenues for the operation of County government.

33. No. The constitutionality of Ordinance 1120 and Act 406 have already been upheld by the Alabama Supreme Court. See *Bedingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988).

34. The base tax is equal to one-half of one percent (.005%) of gross wages earned in Jefferson County, Alabama. The interest and penalties are imposed by Section 10, Ordinance 1120. Pursuant to Section 10, interest on delinquent taxes accrues at the rate of 12 percent per year. Pursuant to Section 10, delinquent taxes are subject to a 10 percent penalty.

35. The County has filed approximately 2,800 collection suits against employees of the United States, its agencies and instrumentalities.

36. Yes, but only upon that portion of gross wages earned in Jefferson County, Alabama. Further, if a judge is in senior status he or she would not owe any County occupational tax.

37. Ordinance 1120 has already been declared lawful and constitutional by a State Circuit Court and by the Alabama Supreme Court. It would be self-defeating and chaotic to conclude that a taxpayer would still have an "honestly held belief" that the Ordinance is unconstitutional as to that taxpayer.

38. Good and sufficient reasons for a waiver of penalty and/or interest may include, but are not limited to, situations where the taxpayer did not pay the tax based upon erroneous information provided by the County Revenue Department. Another good and sufficient reason includes situations where penalty and interest are calculated on an erroneous amount of base tax. In those situations, a taxpayer may be granted a partial waiver of penalty and interest.

39. Section 6-2-35(2), Alabama Code.

40 - 41. There does not appear to be a criminal statute for violation of Ordinance 1120.

/s/ Randy Godeke
RANDY GODEKE, Director,
Jefferson County Department of
Revenue

[Jurat and Certificate of Service Omitted in Printing]

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REQUEST FOR CERTIFICATION TO
APPEAL INTERLOCUTORY ORDER

Filed August 18, 1993

[Caption Omitted in Printing]

Come now the Defendants, Jefferson County, Alabama and Randy Godeke, and the Intervenor, Birmingham-Jef-

ferson Civic Center Authority, and in accordance with Rule 5, Alabama Rules of Appellate Procedure, hereby request this Court to certify as immediately appealable its Interlocutory Order denying Defendant's MOTION FOR SUMMARY JUDGMENT on all federal constitutional and statutory claims (except the Buck Act claim) contained in Counts I and II of the Complaint. In further support of this request, Defendants state as follows:

1. This request for certification is presented to this Court simultaneously with a MOTION TO VACATE PRIOR ORDER, being the ORDER which this Court rendered on April 8, 1993. Said motion demonstrates that if the action by the Jefferson County Circuit Clerk of merely writing "4-9-93 order per sep paper. Jd Rochester" on the Case Action Summary sheet constitutes an entry of the ORDER, the Clerk violated Rule 77(d), Alabama Rules of Civil Procedure, by failing to immediately notify parties of the rendition and entry of the ORDER. Accordingly, this REQUEST FOR CERTIFICATION TO APPEAL INTERLOCUTORY ORDER assumes that the Court will grant the MOTION TO VACATE PRIOR ORDER and render another Order to which this request for certification applies.

2. In its ORDER in paragraph 1 the Court found that:

> 1. In *Bedingfield v. Jefferson County,* 527 So.2d 1270 (Ala. 1988), neither the trial court nor the Alabama Supreme Court *determined* whether Alabama Act No. 406 (Alabama Legislature 1960) authorized the tax in question, or Jefferson County Ordinance No. 1120 (Jefferson County Commission 1987), imposing the tax in question violates the equal protection clause of the *United States Constitution* by creating an unreasonable, unjust and improper classification of citizens subject to the tax while exempting cer-

> tain citizens from said tax in an arbitrary, irrational and unjust manner.

Whereas, in paragraph 3 the Court found that:

> 3. The trial court in *Bedingfield v. Jefferson County,* 527 So.2d 1270 (Ala. 1988), did in fact *consider* the constitutionality of Act No. 406 and Jefferson County Ordinance No. 1120 as it relates to the *Constitution of Alabama* of 1901 and found "nothing" in said Act to be "repugnant" to such a degree as to invalidate the Act, and further did not find Ordinance No. 1120 to be "invalid". (*Order* of Judge Braxton Kittrell, Specially Sitting, CV-87-504-465 and CV-87-504-469, Jefferson County, Alabama, December 11, 1987)

The Court then declared:

> The state constitutional issues in this matter have been previously adjudicated.
>
> Accordingly, summary judgment is GRANTED in favor of defendants and against plaintiffs as to Counts III and IV of the complaint based on the doctrine of *res judicata.* Summary judgment is DENIED as to Counts I and II.

The Court's ORDER confirms the application of the doctrine of *res judicata* to Plaintiffs' Complaint in this case by declaring that neither Act No. 406 or Ordinance 1120 violated the Constitution of Alabama. However, the Court finds that neither the trial court nor the Alabama Supreme Court "determined" whether Act No. 406 or Ordinance No. 1120 "violates the equal protection clause of the United States Constitution", and denied summary judgment as to Count I (federal employees Buck Act and federal equal protection claims) and Count II (non federal employees federal equal protection claim).

The Alabama Supreme Court has repeatedly held that the doctrine of *res judicata* bars claims which *could have been raised* in the prior suit along with the claims that were actually raised and adjudicated. See *Baker v. City of Guntersville*, 1992 WL 69934 (1992); *NAACP v. Hunt*, 891 Fed.2d 1555 (11th Cir. 1990); *Dairyland Insurance Company v. Jackson*, 566 So.2d 723 (Ala. 1990); *Hughes v. Allenstein*, 514 So.2d 858 (Ala. 1987); *Robinson v. Holley*, 549 So.2d 1 (Ala. 1989); *Garris v. South Alabama Production Credit*, 537 So.2d 911 (Ala. 1989); *Dominick's, Inc. v. Key*, 546 So.2d 1047 (Ala. 1984); *Wheeler v. First Alabama Bank*, 364 So.2d 1190 (Ala. 1978).

3. It is axiomatic that the alleged violations of the equal protection clause of the United States Constitution could have been raised by the *Bedingfield* plaintiffs. Thus, it is immaterial whether the *Bedingfield* trial court or the Supreme Court actually "determined" or "adjudicated" such claim. Because the federal equal protection claim *could have been raised* in *Bedingfield*, that claim is clearly barred by *res judicata*.

4. In accordance with the requirements of Rule 5, the Defendants assert the following:

a. The applicability of *res judicata* to the federal constitutional and statutory claims in Counts I and II (except Buck Act claim) is a controlling question of law as to which there is a substantial ground for difference of opinion.

b. That an immediate appeal from the ORDER would materially advance the ultimate termination of the litigation.

c. That the appeal would avoid protracted and expensive litigation.

Specifically, Defendants contend that the application of *res judicata* to the federal equal protection claims in

Counts I and II of the Complaint, which are claims that could have been raised in *Bedingfield*, is a controlling question of law which will dispose of all federal constitutional claims in this case.

Secondly, such adjudication of the federal constitutional claims would materially advance the ultimate termination of the litigation by leaving only the Count I (Buck Act) claim as to certain federal employees. Such federal employees are limited in number. Moreover, the Buck Act claim is a question of law which may be quickly decided on a follow up motion for summary judgment while the Rule 5 appeal is proceeding.

Finally, such disposition of the federal constitutional claims will avoid protracted and expensive litigation. The Defendant Jefferson County is a public entity. The Intervenor Birmingham-Jefferson County Civic Center is a public entity. The occupational tax revenue goes to the County General Fund. $10,000,000 per year is irrevocably pledged to payment of Birmingham-Jefferson County Civic Center bonds. The balance of about $26,000,000 represents approximately *one-third* of the County General Fund. It pays for hundreds of public projects and public contracts and commitments for public services to thousands of individuals. Accordingly, if the federal constitutional claims in Counts I and II remain in this case, the Defendants must initiate contingency planning that may include suspension and termination of projects and contracts and cancellation of commitments; hiring freezes and development of employee lay-off lists. The affected projects include the renovation of the County Nursing Home (for the impecunious) currently in process, renovations of the Cooper Green Hospital (for indigents) currently in process and the construction of the Juvenile and Family Court of Jefferson County, phase one currently in progress. There are hundreds of individuals and institutions who have purchased securities issued by the County

and by the Birmingham-Jefferson Civic Center which are secured and paid by occupational tax revenue. These individuals and institutions will be greatly concerned for the value and security of the bonds. An immediate appeal with disposition of the federal constitutional claims on *res judicata* should completely diminish the disruption, confusion and concern described above.

Also, as previously noted to the Court, the class members involved in Count II of the Complaint include *every taxpayer* of the Jefferson County occupational tax. There are several hundred thousand of such putative class members. Defendants do not have an individual identification by name and address of most of the class members. Defendants rely on employers to withhold and make payment of the occupational tax through consolidated returns. Discovery and identification of the class members will disrupt the business of the Department of Revenue and the County at a substantial cost of lost productive time and incurrence of overtime for the County and for all of the public employers and the private employers from whom information must be obtained. Defendants contend that the Rule 5 appeal will result in the barring of all such federal constitutional claims which will dispose of the foregoing loss of public and private funds and resources for such class certification and notification.

5. Defendants submit that no party will be prejudiced by an interlocutory appeal. The Plaintiffs will be spared the expenditure for and effort of discovery and class certification. Further, the intervening time period may be used to seek legislation that would moot the underlying complaint in the future.

6. Defendants submit that there can be no more appropriate use of a Rule 5 appeal than exists in this case. The great impact of the federal constitutional claims on the public interests described above is compelling for the

application of a Rule 5 appeal which provides a very realistic opportunity to avoid the great public losses and other grim effects of its continuation.

[Subscription of Attorney and Certificate of Service Omitted in Printing]

* * * * * * *

IN THE CIRCUIT COURT FOR
JEFFERSON COUNTY, ALABAMA

ORDER

Filed November 17, 1993

[Caption Omitted in Printing]

After a consideration of the law, statutes, legal evidence and argument of counsel for the parties the Court finds that Defendant is entitled to summary judgment as to certain claims raised by the Plaintiffs due to the doctrine of res judicata, but that certain of Plaintiffs' claims should not be dismissed. The Court FINDS as follows:

1. In *Bedingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988), neither the trial court nor the Alabama Supreme Court determined whether Alabama Act. No. 406 (Alabama Legislature 1967), authorizing the tax in question, or Jefferson County Ordinance No. 1120 (Jefferson County Commission 1987), imposing the tax in question, violates the equal protection clause of the United States Constitution by creating an unreasonable, unjust and improper classification of citizens subject to the tax, while exempting certain citizens from said tax in an arbitrary, irrational and unjust manner.

2. In *Bedingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988), neither the trial court nor the Alabama Supreme Court determined whether the tax in question violates

the Buck Act (4 U.S.C. § 111) as it pertains to federal employees.

3. The trial court in *Bedingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988), did in fact consider the constitutionality of Alabama Act No. 406 and Jefferson County Ordinance No. 1120 as it relates to the *Constitution of Alabama* of 1901 and found "nothing" in said Act to be "repugnant" to such a degree as to invalidate the Act, and further did not find Ordinance No. 1120 to be "invalid." (*Order* of Judge Braxton Kittrell, Specially Sitting, CV-87-504-465 and CV-87-504-469, Jefferson County, Alabama, December 11, 1987.) Thus the state constitutional issues in this matter have been previously adjudicated.

Accordingly, Summary Judgment is GRANTED in favor of Defendant, and against Plaintiffs as to Counts Three and Four of the Complaint based on the doctrine of res judicata. Summary judgment is DENIED as to Counts One and Two.

Done and Ordered this 17th day of November, 1993.

JOHN E. ROCHESTER, Circuit Judge
Specially Sitting

* * * * * * *

IN THE CIRCUIT COURT FOR
JEFFERSON COUNTY, ALABAMA

ORDER

Filed November 17, 1993
[Caption Omitted in Printing]

This case came on for hearing on Defendants' and Intervenor's REQUEST FOR CERTIFICATION TO APPEAL INTERLOCUTORY ORDER. Defendants Jefferson County and the Birmingham-Jefferson Civic Center Au-

thority urge the Court to certify as appealable under Rule 5, Alabama Rules of Appellate Procedure, that portion of its ORDER of November 17, 1993, denying summary judgment for Defendants on Count 1 and Count 2 of Plaintiff's Complaint. Defendants' summary judgment motion maintained that all four counts of the Complaint, except that portion of Count 1 asserting federal employees' Buck Act (4 U.S.C. § 111) claims, are barred by *res judicata* based upon the decision of the Supreme Court in *Bedingfield v. Jefferson County*, 527 So.2d 1270 (1988). The ORDER granted summary judgment as to Counts 3 and 4 based on the doctrine of *res judicata*. The remaining Count 1 asserts federal employees' Buck Act claims and federal constitutional claims. The remaining Count 2 asserts non-federal employees' federal constitutional claims.

In support of the REQUEST FOR CERTIFICATION to appeal under Rule 5, the parties have informed the Court and the Court hereby finds the following with respect to the Rule 5 requirements.

The Jefferson County occupational tax at issue in this case generates approximately $36,000,000 per year. Ten million dollars of the annual proceeds are pledged for a twenty year period to pay the main component of debt service on bonds of the Birmingham-Jefferson Civic Center authority (the "Civic Center Authority") that are now outstanding in the principal amount of $123,205,000 (the City of Birmingham has pledged $3,000,000 per year to pay the remaining debt service on these bonds).

With respect to class certification there are several hundred thousand putative class members who pay the County occupational tax. However, Defendants rely on employers to withhold and pay the tax and, therefore, Defendants do not have an individual identification by name and address of most of the putative class members.

WHEREFORE, upon due consideration of the foregoing; the purpose and requirements of Rule 5, Alabama Rules of Appellate Procedure; and, the arguments of counsel, it is the OPINION of the Court and the Court thereby finds that the portion of its ORDER denying summary judgment on Counts 1 and 2, except for the federal employees' Buck Act claim, should, as a matter of public interest and exigency, be and hereby is CERTIFIED as immediately appealable in accordance with Rule 5, Alabama Rules of Appellate Procedure. The Court further finds and CERTIFIES as follows:

1. Whether Plaintiffs' claims asserted in Counts 1 and 2 are also barred by the doctrine of *res judicata* is a controlling question of law as to which there is substantial ground for difference of opinion.

2. The Plaintiffs' claims asserted in Counts 1 and 2 also present a controlling question of law, as to which there is substantial ground for difference of opinion, with respect to the issue of whether Act No. 406 enacted by the Legislature of Alabama in 1967 (the statute authorizing the levy of the County's occupation tax), by its terms, denied the Plaintiffs and other citizens similarly situated the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution. Act No. 406 and the general professional licensing laws of the State of Alabama exempt certain professions and occupations from the County's occupation tax and in so doing make certain legislative classifications among the citizens of the County for purposes of levying the tax in question.

3. An immediate appeal from the Interlocutory ORDER would materially advance the ultimate termination of the litigation. While the questions herein certified are on appeal, this Court expects to proceed to adjudicate the sole remaining Buck Act claim on behalf of a relatively small class of federal employees who work in the

County. The parties have advised the Court that they are not aware of any factual disputes pertaining to the Buck Act claim, therefore, said claim may be decided on cross motions for summary judgment, thereby terminating the litigation in the circuit court.

4. An interlocutory appeal would avoid protracted and expensive litigation. If it is determined by the Rule 5 appeal that Counts 1 and 2 are barred either by *res judicata* or by decision of the equal protection question as a matter of law, both the Defendants and the Plaintiffs' employers in the County would be spared the great cost and disruption of having to identify and locate and give notice to each of the several hundred thousand class members.

DONE and ORDERED this 17th day of November, 1993.

/s/ John E. Rochester
JOHN E. ROCHESTER, Circuit Judge
Specially Sitting

* * * * * * * *

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1994-95

1930255

Jefferson County and the Birmingham-Jefferson Civic Center Authority

v.

Jason Richards, et al.

Appeal from Jefferson Circuit Court
(CV-92-3191)

ALMON, JUSTICE.

This appeal by permission is from the denial of a summary judgment in a declaratory judgment action brought on behalf of two classes of taxpayers against Jefferson County. The taxpayers sought to have Act 406, 1967 Ala. Acts, and Jefferson County Ordinance 1120, adopted in 1987, declared unconstitutional. Act 406 authorizes the Jefferson County Commission to levy a county occupational tax on all persons who earn wages in the County and who are not required to pay the state business license tax. Ordinance 1120 levies the county occupational tax at the rate of .005 ($\frac{1}{2}$ of 1%) on all eligible income earned in the county, exempting persons who pay the state business license tax and domestic servants employed in private homes. The complaint was filed by two classes of taxpayers: the "Foley-Dykes" class, which represents all Federal employees subject to the tax, and the "Richards-Hill" class, which represents all non-Federal employees subject to the tax. The complaint alleges that Act 406 and Ordinance 1120 violate the equal protection and due process provisions of the Federal and State constitutions, and, with regard to the class of Federal employees only, the Buck Act, 4 U.S.C. § 111 et seq. The plaintiffs allege

that the Act and the ordinance are made unconstitutional by what they call the arbitrary and irrational character of the exemptions. The Birmingham-Jefferson Civic Center Authority ("BJCC") was allowed to intervene, asserting as its interest $10 million per year of occupational tax proceeds that have been pledged to the BJCC for a 20-year period to repay BJCC special tax bonds that are now outstanding in the principal amount of over $123 million.

The County moved for a summary judgment, contending that all of the claims, except for the Federal employees' Buck Act claim, are barred by the doctrine of *res judicata*, based on the action that was the subject of this Court's opinion in *Bedingfield v. Jefferson County*, 527 So. 2d 1270 (Ala. 1988). The trial court entered a summary judgment for the County on all State constitutional claims, but denied the motion for summary judgment with regard to the Federal constitutional and statutory claims, stating:

> "In *Bedingfield v. Jefferson County*, 527 So. 2d 1270 (Ala. 1988), neither the trial court nor the Alabama Supreme Court determined whether Alabama Act No. 406 (Alabama Legislature 1967), authorizing the tax in question, or Jefferson County Ordinance No. 1120 (Jefferson County Commission 1987), imposing the tax in question, violates the equal protection clause of the United States Constitution by creating an unreasonable, unjust and improper classification of citizens subject to the tax, while exempting certain citizens from said tax in an arbitrary, irrational and unjust manner."

Pursuant to Rule 5, Ala. R. App. P., we granted the County permission to appeal the denial of the summary judgment. The issue before us is whether the trial court correctly held that the Federal constitutional claims are

not barred by the doctrine of *res judicata* and thus correctly denied the summary judgment on these claims.

The doctrine of *res judicata* is a well-established principle of law:

> "The elements of res judicata, or claim preclusion, are (1) a prior judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) with substantial identity of the parties, and (4) with the same cause of action presented in both suits. *Hughes v. Allenstein*, 514 So. 2d 858, 860 (Ala. 1987)."

Dairyland Insurance Co. v. Jackson, 566 So. 2d 723, 725 (Ala. 1990).

> "If those four elements are present, any claim that was or could have been adjudicated in the prior action is barred from further litigation."

Id.; *Crutcher v. Wynn*, 591 So. 2d 453, 454 (Ala. 1991); *Ex parte McCracken*, 576 So. 2d 664, 665 (Ala. 1991); *Wood v. Tricon Metals & Services, Inc.*, 548 So. 2d 138, 140 (Ala. 1989); *Trimble v. Bramco Products, Inc.*, 351 So. 2d 1357 (Ala. 1977).

> "In general a judgment is res judicata not only as to all matters litigated and decided by it, but as to all relevant issues which could have been but were not raised and litigated in the suit."

Heiser v. Woodruff, 327 U.S. 726, 735 (1946) (citations omitted).

The appeal in *Bedingfield* arose from two complaints that were consolidated in a single action. One complaint was filed by Hoyt Bedingfield, Jr., individually as a taxpayer, and also in his capacity as acting director of finance of the City of Birmingham, and by the City of Birmingham. The Bedingfield/Birmingham complaint requested a judgment declaring

> "that Ordinance No. 1120 adopted by the Jefferson County Commission is void and invalid, and if necessary, that Act No. 406 passed by the Alabama Legislature in 1967 and approved by the Governor on September 7, 1967, is void and invalid to the extent that it supports any comprehensive occupational tax on all persons working in Jefferson County."

Among the grounds alleged in that complaint were that "Act 406 is a violation of the equal protection requirements and provisions of the federal and state constitution," and that "Act 406 is vague and ambiguous and therefore is a violation of the due process requirements of the state and federal constitution."

The second complaint sought declaratory and injunctive relief "against the action of the Jefferson County Commission levying an occupational tax on employees of Jefferson County." It was filed by three persons "in their individual capacity" as "employees within Jefferson County." In addition to several other allegations of violations of due process and equal protection principles, the complaint alleged that the tax

> "constitutes a denial of equal protection in violation of the Fourteenth Amendment of the United States Constitution. *Said Act exempts professional occupations required by State law to be licensed but does not exempt other professional and nonprofessional occupations.*"

(Emphasis added.) This allegation is the substance of the allegations made in the complaint now before the Court.

The complaint that is the subject of this appeal asks the circuit court to "declare the occupational tax unconstitutional, as depriving plaintiffs of due process of law and equal protection of the laws" guaranteed under the United States and Alabama Constitutions. The same cause of action was presented in both actions. Both were

actions for declaratory judgments challenging the constitutionality of the Jefferson County occupational tax. Both complaints alleged violations of the equal protection and due process provisions of the State and Federal constitutions. The appellate briefs in *Bedingfield* argued an equal protection issue regarding the fact that Act No. 406 applied only to counties with a population of 500,000 or more. *Bedingfield* was decided, both by the circuit court and by this Court, on other State constitutional grounds, but the Federal and State equal protection and due process claims were pleaded, and it is at least true that they "could have been adjudicated." *Dairyland Ins. Co. v. Jackson*, 566 So. 2d 723, 725 (Ala. 1990). Furthermore, they arguably *were* adjudicated, because they were grounds stated as a basis for relief, and a final judgment denying relief was affirmed.

"*Res judicata* applies not only to the precise legal theory presented in the prior case, but to all legal theories and claims arising out of the same nucleus of operative fact." *NAACP v. Hunt*, 891 F. 2d 1555, 1561 (11th Cir. 1990) (citations omitted).

> "'[A] party . . . is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds on which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible.' *Baltimore Steamship Company v. Vernon Philips*, 274 U.S. 316 [47 S.Ct. 600, 71 L.Ed.2d 1069] (1926)."

Century 21 Preferred Properties, Inc. v. Alabama Real Estate Comm'n, 401 So. 2d 764, 768 (Ala. 1981) (per Jones, J., with three Justices concurring and two Justices concurring in the result).

The only other element of *res judicata* that is at issue is "substantial identity of the parties," *see Dairyland, supra.*

> "The second set of persons to whom *res judicata* applies is composed of those persons who are or were in privity with the parties to the original suit. . . . Privity is defined as 'a relationship between one who is a party of record and a nonparty that is sufficiently close so a judgment for or against the party should bind or protect the nonparty.' . . . Privity exists where the nonparty's interests were represented adequately by the party in the original suit. . . . Privity also exists where a party to the original suit is 'so closely aligned to a nonparty's interest as to be his virtual representative.' *United Merchants & Mfrs., Inc. v. Sanders*, 508 So. 2d 689, 692 (Ala. 1987)."

NAACP v. Hunt, supra, at 1560-61 (citations omitted). *See also Century 21, supra.* The taxpayers in the *Bedingfield* action adequately represented the interests of the taxpayers here, and the respective taxpayers' interests are not only closely aligned — they are essentially identical. The "substantial identity of the parties" element of *res judicata* is met here.

The wisdom of disallowing successive attacks on the county tax on grounds that could have been pursued and adjudicated in the initial challenge is demonstrated by the BJCC's motion to intervene, which recites that it issued two series of bonds in 1989 to expand and improve the civic center. The motion continues:

> "[P]ursuant to that certain Pledge and Appropriation Agreement between the Defendant Jefferson County and the intervenor, said Defendant appropriated, pledged and agreed to pay a portion of the proceeds of the Occupational Tax [at] issue in this matter to the BJCC for repayment of the Series 1989 and Series 1989B Capital Outlay Special Tax Bonds issued by the BJCC in twenty (20) annual payments of

> $10,000,000.00 beginning in the year 1989 and ending in the year 2008."

In 1989, the county and the Authority, in pledging the occupational tax revenue and issuing the bonds, could have relied on *Bedingfield* as authoritatively establishing that the county occupational tax was not unconstitutional for the reasons asserted by the *Bedingfield* plaintiffs. To allow a challenge now that was pleaded and could have been adjudicated in *Bedingfield* would not only violate the *res judicata* principles discussed above, but would also improperly interfere with the operations of the county and the BJCC and undermine the security of the bonds, to the detriment of the bondholders.

For the foregoing reasons, we conclude that the circuit court incorrectly held that *Bedingfield v. Jefferson County*, 527 So. 2d 1270 (Ala. 1988), did not, by the operation of the doctrine of *res judicata*, bar this action.

REVERSED AND REMANDED.

Shores, Kennedy, Cook, and Butts,* JJ., concur.

Maddox, J., dissents.

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*Although Justice Butts was not a member of this Court when this case was orally argued, he has listened to the tape of oral argument and has studied the record.

Jefferson County and the Birmingham-Jefferson Civic Center Authority v. Jason Richards, et al.

MADDOX, JUSTICE (dissenting).

The elements of the doctrine of res judicata have been precisely set out by this Court in *Wheeler v. First Alabama Bank of Birmingham*, 364 So. 2d 1190, 1199 (Ala. 1978), where this Court said:

> "The elements of res judicata are as follows: (1) prior judgment rendered by court of competent jurisdiction; (2) prior judgment rendered on the merits; (3) parties to both suits substantially identical; and (4) same cause of action present in both suits."

See also Dominey v. Mathison, 292 Ala. 293, 293 So. 2d 471 (1974), and my dissenting opinion in *Century 21 Preferred Properties, Inc. v. Alabama Real Estate Comm'n*, 401 So.2d 764, 770 (Ala. 1981). Even a cursory examination of this doctrine as applied to the facts of this case reveals that it has no application to this case. In this dissent, I will make a brief statement of the facts and will state the principle of law I think should be applied to sustain the trial court's order.

The majority holds that these plaintiffs are bound by the judgment rendered in *Bedingfield v. Jefferson County*, 527 So. 2d 1270 (Ala. 1988), where the City of Birmingham challenged the constitutionality of Act No. 406 and the validity of a county ordinance establishing an occupational tax.

The trial judge, in denying the defendant's motion for a summary judgment in this case (that motion being based on the ground that the action was barred by the doctrine of *res judicata)*, issued an order in which he concluded, in part, that "[i]n *Bedingfield v. Jefferson County*, 527 So. 2d 1270 (Ala. 1988), neither the trial court nor

[this Court] determined whether Act No. 406 (Alabama Legislature 1967), authorizing the tax in question, or Jefferson County Ordinance No. 1120 (Jefferson County Commission 1987), imposing the tax in question, violates the equal protection clause of the United States Constitution by creating an unreasonable, unjust and improper classification of citizens subject to the tax, while exempting certain citizens from said tax in an arbitrary, irrational and unjust manner." The trial judge also determined that "[i]n *Bedingfield v. Jefferson County*, 527 So. 2d 1270 (Ala. 1988), neither the trial court nor [this Court] determined whether the tax in question violates the Buck Act (4 U.S.C. § 111) as it pertains to federal employees." I agree with the trial court on both points.

In concluding that the trial judge was correct, I have examined the pleadings in *Bedingfield* and the order entered by the trial judge in that case and I have studied the opinion issued by this Court in *Bedingfield*, a case in which I participated. I have also carefully considered the argument of Jefferson County that "the claims in this case arise from the same nucleus of operative fact as the claims made in *Bedingfield* and [that] because the evidence necessary to support both claims is *identical*, it is axiomatic that the fourth element of *res judicata* is satisfied," and I have given careful consideration to the views of my colleagues expressed in the majority opinion, and my only comment is that if the "same cause of action presented in both suits" element of the res judicata doctrine is so easily satisfied, then it could be extended *ad infinitum* and would establish a precedent that could close the courthouse doors to other plaintiffs in other cases who might find themselves faced with the rule of law herein established. I think that the Court is establishing a bad precedent.

My opinion that *Bedingfield* does not bar the claims presented in this case is the same as that of the trial

judge: that this Court, in *Bedingfield*, did not adjudicate these claims, or any claim similar to them. The West Publishing Company synopsis in *Bedingfield* succinctly states what that case was about, and the issues it adjudicated:

> "City challenged constitutionality of county ordinance establishing occupational tax. The Circuit Court, Jefferson County, Braxton L. Kittrell, Jr., J., upheld ordinance, and appeal was taken. The Supreme Court, Beatty, J., held that: (1) statute authorized county to levy occupational tax; (2) statute was general rather than local legislation; and (3) statute authorizing levy of tax provided for collection of such tax."

527 So. 2d at 1270. Where in the *Bedingfield* opinion is there an adjudication of the federal constitutional claims the plaintiffs raise in the instant action? Neither the order of the trial judge nor the opinion of this Court contains a single reference to whether the Act and the county ordinance violate any provision of the Federal Constitution.

It is true that the plaintiffs, in *Bedingfield*, did allege in their complaint that "[i]f Ordinance No. 1120 were authorized by Act 406, then Act 406 is unconstitutional based upon any one of the following grounds: . . . . B. Act 406 is a violation of the equal protection requirements and provisions of the federal and state constitutions." But I ask this question: Is the mere making of such an allegation in a complaint sufficient to satisfy the "same cause of action presented in both suits" element of the res judicata doctrine? I think not, especially when the adjudicatory orders of the trial court, and of this Court, affirmatively show that the issues in *Bedingfield* involved whether Act No. 406 was a general law or was a local law because the Act was applicable only to counties with a population of 500,000 or more.

But even assuming that the federal equal protection claim was presented and adjudicated in *Bedingfield*, the plaintiffs in this case are attacking the *exemption scheme* contained in Ordinance No. 1120, which exempts a number of occupations from the occupational tax.[1] Clearly,

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[1] Ordinance 1120 taxes the gross receipts of any person who engages in or follows any "vocation, occupation, calling and profession," but exempts from its definition of "vocation, occupation, calling and profession" the following: utility companies; freight lines and equipment companies; electric companies; gas companies; railroads; telephone companies; telegraph companies; express companies; financial institutions; insurance companies; abstract companies; acetylene gas and carbide manufacturers; adding machine, calculating machine, and comptometer businesses; advertising companies; air conditioning plant and equipment businesses; amusement parks; architects; attorneys; auctioneers; automobile dealers; automobile accessory dealers; automobile garages and shops; automobile storage garages; tire retreading shops; barbers; baseball parks; battery shops; beauty parlors; bicycle and motorcycle dealers; blueprint makers; bond makers; bottlers; bowling alleys; iron, railway supply, furnace supply, and mining supply brokers and agents; broom, brush, and mop manufacturers; cereal and soft drink retailers and wholesalers; certified public accountants; cigar, cigarette, and cheroot retailers and wholesalers; circus operators; cleaning and pressing establishments; coal and coke dealers; coffin and casket manufacturers, dealers, and agents; collection agencies; commission merchants or merchandise brokers; concert and musical entertainers; persons engaged in discounting notes, mortgages, and conditional sales contracts; construction companies or contractors; cotton buyers; cotton compress operators; millers; persons operating cotton warehouses; credit agency personnel; persons operating creosoting businesses; delicatessen shops; dentists; detectives; film developers and printers; directory printers; refrigerator dealers; embalmers; engineers; domestic servants employed in private homes; owners and operators of fertilizer factories; damaged and close out goods salesmen; fireworks dealers; fortunetellers; palmists; clairvoyants, astrologers; phrenologists and crystal gazers; fruit dealers; gasoline station and pump operators; glass salesmen; golf course operators; hat cleaners; fur dealers; horse, rodeo, and dog and pony show operators; horse and mule dealers; ice cream manufacturers; innkeepers; junk dealers; launderers; sleight-of-hand artists; lighting rod installers; lumber dealers and jobbers; lumberyard operators; machinery repair shops; manicurists; hairdressers; upholsterers; doctors, chemists, bacteriologists, and roentgenologists; persons engaged in the photocopy business; miners; monument and tombstone sellers; motion picture operators; oculists, optometrists, and opticians; osteopaths and chiropractors; operators of packing houses and cold storage plants; pawnbrokers; peddlers and itinerant vendors; photographers; musical instrument salesmen; pig iron storage operators; pistol and knife dealers; playing card salesmen; plumbers, steamfitters and tin shop operators; operators of pool halls, owners of racetracks and athletic fields; radio salesmen; real estate brokers and agents; restaurant, cafe, and cafeteria operators; operators of roadhouses, nighclubs, and public dance halls; sandwich shops, barbecue stands, hamburger and hot dog stands; sawmills; scientists, naturopaths and chiropodists; sewing machine salesmen; shooting gallery operators; shotgun and rifle dealers; skating rink operators; soliciting brokers; stock and bond brokers; street fair and carnival operators; syrup and sugar factory operators; theater, vaudeville, and variety show operators; ticket scalpers; tourist camp operators; tractor, road machinery, and trailer dealers; trading stamp merchants; freight carriers; transient dealers, vendors, and peddlers; turpentine stillers; vending machine operators; veterinarians; warehouse operators; wax factory operators and waste grease and animal by-product purchasers and receivers. See Ordinance 1120, § 1(B) and § 2; §§ 40-12-40 through 40-12-180, § 40-12-50, §§ 40-12-52 through 40-12-55, §§ 40-12-57 through 40-12-60, § 40-16-6, and § 27-4-9, Ala. Code 1975.

that claim was not presented or adjudicated in *Bedingfield*.

Jefferson County and BJCC argue that even if the plaintiffs' claims were not previously raised or adjudicated in the *Bedingfield* case, the claims are barred, nevertheless, because "any claim that was or could have been adjudicated in the prior action is barred from further litigation." *Dairyland Insurance Co. v. Jackson*, 566 So. 2d 723, 725 (Ala. 1990). Stated differently, the County and BJCC contend that the theory on which the plaintiffs bring this action could have been asserted in the

Bedingfield case and that this action is therefore due to be dismissed.

The test for determining whether two cases involve substantially the same cause of action is whether the same evidence would support a recovery in both actions. *Barber v. Fields*, 624 So. 2d 532, 536 (Ala. 1993); *Vaughan v. Barr*, 600 So. 2d 994, 996 (Ala. 1992); *Waters v. Jolly*, 582 So. 2d 1048, 1053 (Ala. 1991); *Garris v. South Alabama Production Credit Ass'n*, 537 So. 2d 911, 914 (Ala. 1989); *Dominex, Inc. v. Key*, 456 So. 2d 1047, 1054-55 (Ala. 1984); *Wheeler v. First Alabama Bank of Birmingham*, 364 So. 2d 1190, 1200 (Ala. 1978). In *Barber v. Fields*, this Court reversed a summary judgment entered on *res judicata* grounds where both the former and the latter cases involved the city water service but the claims in the latter case, which pertained to the removal of water meters, was not litigated in the former case, which involved a claim that the city's refusal to extend water service to the plaintiff's land was a violation of her right to equal protection of the laws. *Barber*, 624 So. 2d at 536. In *Vaughan v. Barr*, this Court reversed a judgment entered on *res judicata* grounds where both the former case and the latter case involved the same land and landowners but the former case, which involved a boundary dispute, was "based on different theories" and "require[d] different evidence" from that required in the latter case, which involved a claim of an easement by necessity. *Vaughan*, 600 So. 2d at 996.

Although this case and the *Bedingfield* case involve Act 406 and Ordinance 1120, the similarity there ends, because the evidence necessary to prove the claims asserted in this case, and the legal arguments in support of those claims, will be very different from those in *Bedingfield*. Here, the plaintiffs allege that the exemptions to the tax violate their equal protection rights under the Federal Constitution. The Federal employees are permitted to

maintain their Buck Act claims. How are their claims different from those of the non-Federal employees who claim equal protection violations? In each case, the plaintiffs apparently are citizens of the United States who are claiming protection of their rights under Federal constitutional and statutory provisions. The foundation of their claims, the Federal Constitution, is the same.

I have carefully examined the arguments of Jefferson County and those of BJCC, and I recognize the importance of this case to those entities, but I think the law is against them. The plaintiffs' claims in this case are just different from those presented in *Bedingfield*, and the evidence necessary to prove their claims will be very different from the evidence used to prove the claims asserted in *Bedingfield*. In fact, the issues presented in *Bedingfield* were largely legal issues relating to the classification between counties of 500,000 or more in population and counties of less than 500,000 in population and to the question of whether Act 406 violated the Alabama Constitution, and there is no mention in *Bedingfield* of any Federal constitutional claims adjudicated in either the trial court or this Court.

Based on the foregoing, I believe that the fourth element of the doctrine of *res judicata* as set forth in *Dairyland Insurance Co. v. Jackson*, 566 So. 2d 723, 725 (Ala. 1990) ("the same cause of action presented in both suits"), is not present in this case; I believe that the trial judge correct concluded that the plaintiffs could maintain their action.

* * * * * * *

APPLICATION FOR REHEARING

Filed April 14, 1995
[Caption Omitted in Printing]

Come now Jason Richards and Fannie Hill, Appellees, and respectfully move the Court to grant them rehearing in the above captioned cause, with affirmance rather than reversal of the Circuit Court's ruling upon partial summary judgment, upon the following grounds:

1. The Court's opinion recognizes Appellants' claim as one to "declare the occupational tax unconstitutional, as depriving plaintiffs of due process of law and equal protection of the laws" guaranteed under the Untied States and Alabama Constitutions, but fails to acknowledge that Hoyt Bedingfield and his co-plaintiffs were incapable of binding them to the outcome of his prior litigation his was not a class action (which would have allowed plaintiffs to "opt out" or intervene to protect their interests here in issue).

2. Appellant Fannie Hill's standing to represent domestic servants employed in commercial buildings who are subject to the tax, while domestic servants employed in private homes are exempted, has been rejected without comment by this Court, in spite of the fact that neither Bedingfield nor any of his co-plaintiffs had standing to present such a claim.

[Subscription of Attorney and Certificate of Service Omitted in Printing]

* * * * * * * *

IN THE SUPREME COURT OF ALABAMA

June 9, 1995

1930255

Jefferson County and the Birmingham-Jefferson Civic Center Authority v. Jason Richards, et al. (Jefferson: CV-92-3191)

NOTICE

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

ALMON, J. — Shores, Kennedy, Cook and Butts, JJ, concur; Maddox, J., dissents.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this 9th day of June, 1995.

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

Supreme Court, U.S.
FILED
JAN 8 1996
CLERK

No. 95-386

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1995

JASON RICHARDS and FANNIE HILL,
Petitioners

vs.

JEFFERSON COUNTY, ALABAMA
and BIRMINGHAM-JEFFERSON CIVIC
CENTER AUTHORITY,
Respondents

APPELLANTS' BRIEF ON THE MERITS

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28 pp

QUESTIONS PRESENTED FOR REVIEW

I.

Does the convoluted exemption scheme described in Alabama Justice Maddox' dissenting opinion – attacked for the first time ever in the case at bar – warrant reversal of the Alabama Supreme Court's decision in this case on federal equal protection grounds?

We contend that it does, because neither the State of Alabama nor Jefferson County can advance any rational interest served by the crazy salad exemption scheme built into the Jefferson County occupational tax.

II.

Can Alabama, through interpretation of its state case law pertaining to *res judicata*, deny plaintiffs' never before presented, and never before heard, federal constitutional claims, thus denying plaintiffs due process of law?

We contend that it cannot, and that the Alabama Supreme Court's reversal of a denial of summary judgment below – unless reversed by this Honorable Court – will effectively deny these plaintiffs any opportunity to ever be heard upon meritorious federal constitutional claims. We contend that because no party to a prior proceeding, *Beddingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988), which went to judgment before the effective date of the tax, had ever paid it, no one in *Bedingfield, supra,* could have launched the exemption scheme attack made here.

CERTIFICATE OF INTERESTED PERSONS

Respondents' Counsel	Edwin A. Strickland Charles S. Wagner Jeffrey M. Sewell Charlie D. Waldrep Thomas L. Stewart William M. Slaughter Richard H. Walston
Petitioners' Counsel	William J. Baxley Joel E. Dillard
Respondents	Jefferson County, Alabama Birmingham-Jefferson Civic Center Authority
Trial Judge	Hon. John Rochester
Petitioners	Jason Richards Fannie Hill and a class of similarly situated persons
Supreme Court of Alabama	Hon. Sonny Hornsby Hon. Hugh Maddox Hon. Reneau Almon Hon. Janie L. Shores Hon. J. Gormon Houston Hon. Mark Kennedy Hon. Kenneth F. Ingram Hon. Ralph Cook Hon. Terry Butts

No other persons are known to have participated directly or indirectly in the appeal of this matter.

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STATEMENT OF GROUNDS OF JURISDICTION

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254 because this Petition is from a decision of the Supreme Court of Alabama in a civil case.

(i) Date of the decision: March 31, 1995

(ii) Application for Rehearing Overruled: June 9, 1995

(iii) No cross petition has been filed.

(iv) Jurisdiction is based on 28 U.S.C. § 1254(1) and Rule 10.1(c) of the Rules of the Supreme Court.

(v) Writ of Certiorari granted November 22, 1995.

STATEMENT OF THE CASE

(1) Nature of Case, Course of Proceedings and Disposition

On May 20, 1988 the Alabama Supreme Court decided *Bedingfield* v. *Jefferson County*, 527 So.2d 1270 (Ala. 1988), rejecting three separate challenges to the county occupational tax here in issue on state law grounds. (R. 231) The same three state law issues had been decided adversely to the *Bedingfield* challengers in a state trial court, prompting that appeal. (R. 265) *Bedingfield, supra,* was not a class action, and did not decide any federal question in the trial or appellate court. A final judgment in the *Bedingfield* case was entered three weeks before the tax became effective. (R. 340)

Neither the plaintiffs nor the defendant in the *Bedingfield* case ever sought to add any additional parties or to make their case a class action, though Alabama's class action practice is well established. Rule 23, *Alabama Rules of Civil Procedure.*

Bedingfield , supra, was decided on these three esoteric state law issues: (1) Whether Jefferson County's occupational tax violated the intent of its own enabling act; (2) Whether the Alabama Constitution was violated by the

enabling act's "bracket bill" status (in Alabama, a "bracket bill" is one which addresses counties by population "brackets" rather than by name), or by the enabling act's similarity to "special, private or local laws" forbidden by the state constitution, *Constitution of Alabama*, 1901, §§ 105, 106, 110, Amendments 375, 389; and (3) Whether the enabling act violated § 104(15) of the *Constitution of Alabama*, 1901, which prohibits local laws from regulating the assessment or collection of taxes. (R. 231) The Circuit Court for Jefferson County decided all three issues in Jefferson County's favor on December 11, 1987 — three weeks before the January 1, 1988 effective date for collection of the tax. (R. 265) Both *Bedingfield* decisions are before this Court in the joint appendix. They reveal a sweeping victory for Jefferson County on all three narrow state law issues, both in the trial court and before the Alabama Supreme Court. After the *Bedingfield* appeal, Jefferson County began collecting its occupational tax.

On April 21, 1992 Jason Richards and Fannie Hill filed a class action complaint in state court, attacking the exemption scheme built into the same county occupational tax. Hill and Richards claimed that the exemption scheme built into the tax denied them equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

A motion for summary judgment, based upon a defense of res judicata, claimed to have resulted from the *Bedingfield* decision, was filed by Jefferson County in the trial court on June 4, 1992. (R. 218) The trial court considered what the *Bedingfield* case was, and was not, in ruling on Jefferson County's motion. (R. 414) *Bedingfield* was not an attack on the exemption scheme built into the occupational tax (indeed, until the county began collecting its occupational tax, no one had standing to complain about exemptions from taxation). No federal constitutional claims were decided by either court in *Bedingfield*, and *Bedingfield* did not

involve attempts by any party to join or effect service of process upon any individuals other than the parties plaintiff and defendant. (R. 414) Neither Jason Richards nor Fannie Hill nor any member of the class they represent were given notice of any kind — actual or constructive — that any claim they might wish to pursue under the Constitution of the United States, after collection of the tax began, could or would be in any way impaired by the *Bedingfield* case. (R. 265)

In the instant case, on April 8, 1993, Jefferson County was granted summary judgment upon all state law claims, but summary judgment was denied as to petitioners' federal constitutional claims. (R. 414) Jefferson County and an intervenor tax recipient, Birmingham-Jefferson Civic Center Authority, then appealed the trial court's denial of summary judgment as to these federal constitutional claims to the Alabama Supreme Court. (R. 418)

The Alabama Supreme Court reversed the trial court on March 31, 1995 and overruled an application for rehearing on June 9, 1995. The dissenting opinion in the Alabama Supreme Court made it clear that no claim remotely similar to these was presented to, heard by, or decided by either the trial court or the Alabama Supreme Court in *Bedingfield*, *supra*. But five justices of the Alabama Supreme Court interpreted this Court's decision in *Heiser* v. *Woodruff*, 327 U.S. 726 (1946), to compel preclusion of the federal claims made by Richards and Hill.

Richards and Hill filed a timely Petition for Writ of Certiorari in this Court, and on November 22, 1995 the writ was granted.

(II) Statement of Facts with References to Record

In *Bedingfield*, which appears in the joint appendix as well as the record on appeal, the Alabama Supreme Court decided that Jefferson County Ordinance 1120 — the

occupational tax here in issue — was not illegal because (1) a statute authorized the county to levy the occupational tax, (2) the statute was general, rather than local legislation, and (3) the statute authorizing levy of the tax provided also for its collection. (R. 231) Neither the trial court's decision in that case, nor the decision of the Supreme Court of Alabama in that case, contained any reference to whether the enabling act or the county ordinance violated any provision of the Federal Constitution. (R. 231, 265) Neither addressed nor decided the validity of the exemption scheme built into the tax. (R. 231, 265)

Richards and Hill sued Jefferson County and its Revenue Department Director, specifically alleging that "[t]his action involves a violation of federal law for which 42 U.S.C. § 1983 provides a remedy." They claimed that the tax here in issue, by its terms, and in actual practice, exempted from its levy, collection and payment "businesses and vocations or occupations listed at Chapter 12, Article 2, Title 40, *Code of Ala.* 1975, as amended, which range from attorneys, certified public accountants, dentists and physicians to blueprint makers, casket manufacturers, pig iron storage operators, lightning rod installers and snuff retailers, and includes a specific exemption for domestic servants employed in private homes." (R. 8) Citing the Fourteenth Amendment to the Constitution of the United States, Richards and Hill specifically averred that the exemption scheme built into the occupational tax denied them equal protection of the laws because it was arbitrary, capricious, irrational and discriminatory in a manner which defied logic. (R. 9) They further complained that the net effect, dollarwise, of the occupational tax, was an absurdity which allowed persons earning hundreds of thousands of dollars a year to completely avoid the tax by paying, individually or through their employers, a small license fee (collected pursuant to Chapter 12, Article 2, Title 40; §§ 40-21-50, 40-21-52, 40-21-53, 40-21-54 and 40-21-55; 40-21-57, 40-21-58,

40-21-59 and 40-21-60; 40-16-6; and 27-4-9 of the *Code of Ala.* 1975, as amended) or, in the case of "domestic servants employed in private homes" (Hill is a domestic servant employed in commercial buildings) by county fiat. (R. 7) Richards and Hill complained that the content, nature and characteristics of their employment was neither reasonably, rationally or fairly different, nor professionally distinct, from the content, nature and characteristics of the employment of persons exempt from the tax. (R. 17) Evidence heard by the trial court bears them out: Jefferson County's Director of Revenue testified that Richards, a law firm courier, paid $31.35 in 1991 on his salary of $6,269, while his employer, an attorney, paid nothing upon an income sixty times greater. (R. 353) He also admitted: "I do not know what was in the minds of the county commissioners in 1987, when the ordinance was adopted exempting 'domestic employees employed in private homes.'" (R. 386)

Totally exempted from the tax are persons who happen to be employed by or as:

> utility companies; freight lines and equipment companies; electric companies; gas companies; railroads; telephone companies; telegraph companies; express companies; financial institutions; insurance companies; abstract companies; acetylene gas and carbide manufacturers; adding machine, calculating machine and comptrometer businesses; advertising companies; air conditioning plant and equipment businesses; amusement parks; architects; attorneys; auctioneers; automobile dealers; automobile accessory dealers; automobile garages and shops; automobile storage garages; tire retreading shops; barbers; baseball parks; battery shops; beauty parlors; bicycle and motorcycle dealers; blueprint makers; bond makers; bottlers; bowling alleys; iron, railway supply, furnace supply and mining supply brokers and agents; broom, brush and mop manufacturers;

cereal and soft drink retailers and wholesalers; certified public accountants; cigar, cigarette and cheroot retailers and wholesalers; circus operators; cleaning and pressing establishments; coal and coke dealers; coffin and casket manufacturers, dealers and agents; collection agencies; commission merchants or merchandise brokers; concert and musical entertainers; persons engaged in discounting notes, mortgages and conditional sales contracts; construction companies or contractors; cotton buyers; cotton compress operators; millers; persons operating cotton warehouses; credit agency personnel; persons operating creosoting businesses; delicatessen shops; dentists; detectives; film developers and printers; directory printers; refrigerator dealers; embalmers; engineers; owners and operators of fertilizer factories; damaged and close out goods salesmen; fireworks dealers; fortunetellers, palmists, clairvoyants, astrologers, phrenologists and crystal gazers; fruit dealers; gasoline station and pump operators; glass salesmen; golf course operators; hat cleaners; fur dealers; horse, rodeo, dog and pony show operators; horse and mule dealers; ice cream manufacturers; innkeepers; junk dealers; launderers; sleight of-hand artists; lightning rod installers; lumber dealers and jobbers; lumberyard operators; machinery repair shops; manicurists; hairdressers; upholsterers; doctors, chemists, bacteriologists, and roentgenologists; persons engaged in the photocopy business; miners; monument and tombstone sellers; motion picture operators; oculists, optometrists and opticians; osteopaths and chiropractors; operators of packing houses and cold storage plants; pawnbrokers; peddlers and itinerant vendors; photographers; musical instrument salesmen; pig iron storage operators; pistol and knife dealers; playing card salesmen; plumbers, steamfitters and tin shop operators; pool halls, owners

of racetracks and athletic fields; radio salesmen; real estate brokers and agents; restaurant, cafe and cafeteria operators; roadhouses, nightclubs and public dance halls; sandwich shops, barbecue stands, hamburger and hot dog stands; sawmills; scientists, naturopaths and chiropodists; sewing machines salesmen; shooting gallery operators; shotgun and rifle dealers; skating rink operators; soliciting brokers; stock and bond brokers; street fair and carnival operators; syrup and sugar factory operators; theater, vaudeville and variety show operators; ticket scalpers; tourist camp operators; tractor, road machinery and trailer dealers; trading stamp merchants; freight carriers; transient dealers, vendors and peddlers; turpentine stillers; vending machine operators; veterinarians; warehouse operators; wax factory operators and waste grease and animal by-product purchasers and receivers.

The price for complete exemption from the tax is minuscule for persons who hold a license of any kind. By way of example, a manicurist pays a state license tax of five dollars, and nothing to Jefferson County, and thereby beats the tax. *Code of Ala.*, 1975, § 40-12-127. A dentist pays twenty-five dollars to the state, and nothing to the county, and achieves complete exemption. *Code of Ala.*, 1975, § 40-12-92. Engineers pay twenty dollars to the state and nothing to the county, and become automatically exempt. *Code of Ala.*, 1975, § 40-12-99. Fortunetellers and crystal ball gazers pay forty dollars for the same result. *Code of Ala.*, 1975, § 40-12-104. Lightning rod installers pay $7.50 to the state and $2.50 to the county. *Code of Ala.*, 1975, § 40-12-120. Chiropractors pay twenty dollars to the state, and nothing to the county, as do shooting gallery operators and mule dealers. *Code of Ala.*, 1975, § 40-12-136, 40-12-112, 40-12-157. Doctors, plumbers and collection agents avoid the tax for payment of twenty-five dollars to the state, and nothing to the county. *Code of*

Ala., 1975, § 40-12-126, 40-12-145, 40-12-80. Scientists and musicians pay ten dollars to the state and nothing to the county. *Code of Ala., 1975*, § 40-12-155, 40-12-82. The list goes on and on without rhyme or reason.

More significant even than the licensees, however, are the employees of insurance companies, express companies, railroads, banks and public utilities, who purchase no licenses, pay nothing whatsoever to the state or the county, but receive complete exemption from the tax. *Code of Ala.*, 1975, § 40-21-50, 40-21-52, 53, 54 and 55; 40-21-57, 58, 59 and 60; 40-16-6; 27-4-9. (R. 337) Pursuant to a definitional exemption grant (describing who will and will not pay its occupational tax) Ordinance No. 1120, Section 1(B), Jefferson County completely exempts, without explanation, all employees of these powerful business interests without requiring licensure, or payments of any kind to the state or the county. (R. 337)

Meanwhile, teachers, policemen, laborers, domestic servants in commercial buildings, law firm couriers, secretaries and anyone else who can't buy a license or secure employment with one of the favored businesses listed at Section 1(B) of Ordinance No. 1120, pay a full half percent of their "gross receipts" and "compensation" to Jefferson County for the privilege of working inside the county line. Ordinance No. 1120, Sections 1(F), 2. (R. 336)

ARGUMENT

I. JEFFERSON COUNTY'S TAX EXEMPTION SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE GUARANTEES OF THE FOURTEENTH AMENDMENT BECAUSE IT IS NOT EVEN MINIMALLY RATIONAL.

Ten years ago, this Court held that when a tax exemption scheme distributes benefits conferred by a state unequally, the distinctions made therein are subject to scrutiny under

the Equal Protection Clause of the Fourteenth Amendment. *Hooper* v. *Bernalillo County Assessor*, 472 U.S. 612 (1985). New Mexico, by statute, had exempted from its state property tax $2,000 of the tax value of property owned by honorably discharged veterans who served on active duty during the Vietnam war, but had limited application of this exemption to veterans who were New Mexico residents before May 8, 1976. Hooper qualified for the exemption in all other respects, but failed to establish a residence in New Mexico until 1981. He applied for the $2,000 exemption, nevertheless, and was denied it based upon his newcomer status. After losing in his efforts to invalidate this discriminatory exemption feature on equal protection grounds before the Bernalillo County Assessor, the County Valuation Board and the New Mexico Court of Appeals, Hooper was granted certiorari here. This Court wasted no time reversing all three New Mexico decisions upholding the exemption scheme because there was simply no rational state interest served by its clear relegation of Vietnam veterans arriving after May 8, 1976 to a status of "second class citizens." 472 U.S. at 623. New Mexico's contention that its exemption scheme rewarded "its own" citizens with gratitude for their honorable military service was rejected here, and this Court held that if a statutory tax exemption scheme cannot pass the minimum rationality test set forth in *Zobel* v. *Williams*, 457 U.S. 55 (1982), equal protection is violated and its inquiry ends. 472 U.S. at 623.

Zobel, supra, involved a statutory scheme for the distribution of state mineral deposit income, in the form of dividends, to all adult residents of Alaska. Mr. and Mrs. Zobel objected to the distribution scheme, a dividend unit plan, because it allowed adult residents one "unit" for each year of residency subsequent to 1959 — the first year of Alaskan statehood. Because they moved to Alaska in 1978, the Zobels insisted that the dividend distribution plan was unfairly discriminatory, and violated the guarantees of the

Equal Protection Clause of the Fourteenth Amendment. They claimed it could not pass this Court's minimum rationality test. 457 U.S. at 61. After an exhaustive analysis of its minimum rationality precedents, a majority of this Court tersely held:

> In our view Alaska has shown no valid state interests which are rationally served by the distinction it makes between citizens who established residence before 1959 and those who have become residents since then. We hold that the Alaska dividend distribution plan violates the guarantees of the Fourteenth Amendment.
>
> —457 U.S. at 65

In so doing, this Honorable Court made it clear that Alaska's only apparent justification for the retrospective aspect of its dividend unit program, "favoring established residents over new residents," was constitutionally unacceptable, citing *Vlandis* v. *Kline*, 412 U.S. 441 (1973). See also, *Shapiro* v. *Thompson*, 394 U.S. 618 (1989).

Tax assessments, rather than exemptions, were the subject of a similar analysis in this Court in *Allegheny Pittsburgh Coal Company* v. *Webster County*, 488 U.S. 336 (1989). There, West Virginia citizens experiencing recent sales of property were assessed in a manner determined by this Court to involve "gross disparities" when compared to their neighbors whose properties had not recently sold. A trial court in West Virginia found that the Webster County Assessor systematically and intentionally discriminated against recent sale property owners by imposing a tax rate often thirty-five times higher than the rate imposed upon their similarly situated neighbors without any other justification for that distinction. It therefore concluded that the scheme was in violation of the Fourteenth Amendment's Equal Protection Clause. The Supreme Court of West Virginia reversed. This Court granted certiorari and again reversed,

based upon the Court of Appeals' failure to recognize the comparative aspects of Allegheny Pittsburgh's complaint. 488 U.S. at 342. Citing *Hillsborough* v. *Cromwell*, 326 U.S. 620, 623 (1946), this Court held that the Equal Protection Clause protects an individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. 488 U.S. at 345.

Applying similar logic, this Court examined a "special use" permit requirement within a zoning scheme in *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1985). There, a group home determined by the city to be a "hospital for the feeble minded" was attacked by a group home owner as violative of equal protection. A federal district judge in Texas upheld the city's right to discriminate against the home and its proposed inhabitants because it found that mental retardation conferred neither suspect nor quasi-suspect status upon them. 473 U.S. at 437. The Fifth Circuit reversed, based upon its conclusion that mental retardation warranted at least quasi-suspect classification and, therefore, higher scrutiny in the district court. This Court granted certiorari because it disagreed with the Fifth Circuit's classification analysis. Although mental retardation was held not to confer quasi-suspect status upon the Cleburne Living Center's residents, this Court nevertheless held classification status was of no consequence because the City of Cleburne's zoning scheme could not pass the minimum rationality test applied in *Hooper* and *Zobel*, *supra*. U.S. citizenship alone was held to be sufficient, under the Fourteenth Amendment, to invoke minimum rationality protection, as follows:

> The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. See *Zobel* v. *Williams*, 457 U.S. 55, 61-63, 102 S.Ct. 2309, 2313-2314, 72 L.Ed.2d 672 (1982); *United*

States Dept. of Agriculture v. *Moreno*, 413 U.S. 528, 535, 93 S.Ct. 2821, 2826, 37 L.Ed.2d 782 (1973). Furthermore, some objectives—such as 'a bare . . . desire to harm a politically unpopular group,' id., 534, 93 S.Ct., at 2826—are not legitimate state interests. See also *Zobel, supra*, 457 U.S. at 63, 102 S.Ct. at 2314. Beyond that, the mentally retarded, like others, have and retain their substantive constitutional rights in addition to the right to be treated equally by the law.

— 473 U.S. at 445.

With the benefit of that standard, this Court conducted a comparative analysis of the types of dwellings which the City of Cleburne required to obtain special use permits and the types not required to do so:

> In the courts below the city also urged that the ordinance is aimed at avoiding concentration of population and at lessening congestion of the streets. These concerns obviously fail to explain why apartment houses, fraternity and sorority houses, hospitals and the like, may freely locate in the area without a permit. So, too, the expressed worry about fire hazards, the serenity of the neighborhood, and the avoidance of danger to other residents fail rationally to justify singling out a home such as 201 Featherston for the special use permit, yet imposing no such restrictions on the many other uses freely permitted in the neighborhood.
>
> — 473 U.S. at 449.

Thus, it was many other similarly situated persons, occupying homes which were in no rational way different from the group home located at 201 Featherston Street, but enjoying complete exemption from the special use permit process, which clinched equal protection relief.

Another tax case, *WHHY, Inc.* v. *Borough of Glassboro*, 393 U.S. 117 (1968), extended this Court's long standing series of foreign corporation discrimination decisions to arbitrary witholdings of tax exemptions. In *WHHY, Inc., supra*, New Jersey granted complete exemption from state real and personal property taxes to domestic nonprofit organizations, but refused to make the same exemption available to otherwise qualified foreign nonprofit corporations. New Jersey claimed it had a right to so discriminate, and its Supreme Court agreed. This Court reversed on minimum rationality grounds which are relevant here, explaining:

> "This Court has consistently held that while a State may impose conditions on the entry of foreign corporations to do business in the State, once it has permitted them to enter, 'the adopted corporations are entitled to equal protection with the state's own corporate progency, at least to the extent that their property is entitled to an equally favorable ad valorem tax basis.' *Wheeling Steel Corp.*. v. *Glander*, 337 U.S. 562, 571-572, 69 S.Ct. 1291, 1296, 93 L.Ed. 1544. See *Reserve Life Ins. Co.* v. *Bowers*, 380 U.S. 258, 85 S.Ct. 951, 13 L.Ed.2d 959; *Hanover Fire Ins. Co.* v. *Harding*, 272 U.S. 494, 47 S.Ct. 179, 71 L.Ed. 372; *Southern R. Co.* v. *Greene*, 216 U.S. 400, 30 S.Ct. 287, 54 L.Ed. 536. Yet New Jersey has denied the appellant a tax exemption which it accords other nonprofit corporations solely because of the appellant's foreign incorporation. This is not a case in which the exemption was withheld by reason of their foreign corporations' failure or inability to benefit the State in the same measure as do domestic nonprofit corporations. Compare *Board of Education of Kentucky Annual Conference of Methodist Episcopal Church* v. *State of Illinois*, 203 U.S. 553, 27 S.Ct. 171, 51 L.Ed. 314. Nor have the appellees advanced any other distinction between this appellant and domestic non-

> profit corporations which would justify the inequality of treatment."

This Court found from the record that WHHY had not been accorded equal treatment, and that the inequality it suffered was not because of the slightest state interest in the "decisive transaction, but solely because of the different residence of the owner". (citing *Wheeling Steel Corporation, supra*). 393 U.S. 117 (1968).

Alabama learned little from *WHHY, Inc., supra.* It was therefore compelled to subsequently appear in this Court, by and through its Insurance Commissioner, in *Metropolitan Life Insurance Company* v. *Ward*, 470 U.S. 869 (1984). *Metropolitan Life* involved two asserted purposes for imposing insurance premium taxes upon domestic corporations at substantially lower rates than those imposed upon foreign corporations — encouraging formation of new domestic insurance companies in Alabama and encouraging investment in local assets and government securities. 470 U.S. at 869. Neither purpose was actually served by penalizing foreign insurers with a higher tax, and recognition by this Court of Alabama's inability to articulate any legitimate purpose for so obviously penalizing foreign corporations carried the day for Metropolitan Life Insurance Company. 470 U.S. at 881.

A common thread runs through each of these relatively recent vintage decisions, and its origin can be traced to an earlier, unassailable decision, *F. S. Guano* v. *Virginia*, 253 U.S. 412 (1920), which simply held:

> [C]lassification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.
>
> — 253 U.S. at 415.

This standard was designed to keep governmental decisionmakers from treating differently persons who are in all relevant respects alike. *Nordlinger* v. *Hahn*, 505 U.S. 1, 10 (1992).

In the case at bar, the unreasonable, arbitrary and irrational exemption scheme built into the Jefferson County occupational tax makes the equal protection violations condemned in *Hooper, Zobel, Allegheny Pittsburgh, Cleburne Living Center, WHHY, Inc.*, and *Metropolitan Life, supra*, appear mild and comparatively inconsequential. Neither the State of Alabama nor Jefferson County can advance any rational governmental interest served by granting complete occupational tax exemptions to the bizarre array of persons described here in brief, and in the dissenting opinion of Alabama Supreme Court Justice Maddox. Manicurists, mule dealers, fortunetellers and engineers are not fairly different in the workplace from teachers, police officers and law firm couriers. Doctors, plumbers and collections agents do not contribute anything to the fabric of Jefferson County society or government different from the contributions of secretaries, laborers and federal judges. The only excuse Jefferson County offers for this loony patchwork of exempt occupations is the fact that its enabling statute prevents their taxation. While such candor is noble, when compared with the rationality claims advanced by local government in *Cleburne Living Center, supra*, it does not confer rationality upon this convoluted, cockamamie exemption scheme. New Mexico at least claimed to be favoring "its own" veterans over outsiders in *Hooper, supra*, and in *Zobel, supra*, Alaska was at least able to advance some provincial rationale for favoring old timers over newcomers. Here, Jefferson County sheepishly admits that only peculiarities of state law prevent it from calling this tax what it really is — an income tax — and that state law further prevents it from taxing anyone who purchases a license of any kind, or secures employment with a bank, insurance

company, public utility or other employer with sufficient clout to be listed among the enabling act's favored callings.

We respectfully submit that, in the history of this Court's decisions addressing the equal protection guarantees under the Fourteenth Amendment, no more irrational violation than this one has appeared. It is not merely violative of the United States Constitution, it is obnoxious to it.

II. RICHARDS' AND HILL'S FEDERAL CONSTITUTIONAL CLAIMS ARE NOT BARRED BY *RES JUDICATA*, BECAUSE THEY ARE SUBSTANTIALLY DIFFERENT PERSONS FROM THE PLAINTIFFS IN *BEDINGFIELD*, AND ARE PURSUING A SUBSTANTIALLY DIFFERENT CAUSE OF ACTION.

We have no quarrel with Alabama's definition of the four necessary elements for a claim preclusion, or res judicata, defense:

> (1) a prior judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) with substantial identity of the parties, and (4) with the same cause of action presented in both suits.

or with its leap, if and when all four elements are met, to this Honorable Court's conclusion in *Heiser* v. *Woodruff*, 327 U.S. 726, at 735, that "[i]n general a judgment is res judicata not only as to all matters litigated and decided by it, but as to all relevant issues which could have been but were not raised and litigated in the suit". We do, however, disagree sharply with its reliance upon *Heiser* v. *Woodruff*, *supra*, for the proposition that these wholly different parties, prosecuting a wholly different cause of action (which could not have been litigated in *Bedingfield*), are bound thereby. *Heiser*, *supra*, involved an attempt to re-litigate in bankruptcy court a fraud claim twice litigated — once by a bankrupt and once by his trustee. It did not address claims by strangers to a

previous action (like Richards and Hill) which could not have been presented in the earlier action (because they did not begin to accrue until three weeks post judgment).

Our quarrel is with the Alabama Supreme Court's failure to recognize that elements three and four of its test definition are missing in the case at bar, and with its failure to consider that the Richards and Hill attack on the exemption scheme built into the Jefferson County occupational tax could not have been heard in the *Bedingfield* case, because no party there was a taxpayer. (R. 265) When *Bedingfield* was decided, no human being had ever paid the tax. (R. 340) Therefore, no *Bedingfield* plaintiff had standing to attack this exemption scheme.

Obviously, Jason Richards and Fannie Hill are not the same persons as Hoyt Bedingfield, Carolyn Phillips, John Rogers and Dale Patton. Aware of this, the Alabama Supreme Court appears to have confused the fiduciary exception for collateral estoppel cases, recognized by this Court in *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573 (1974), with its cases involving claim preclusion, or *res judicata*. This is unfortunate because, even if this were a collateral estoppel case — which it is not — the absence of any fiduciary relationship by and between the *Bedingfield* plaintiffs and those here would compel application of the *Sea-Land Services* general rule "that nonparties to the first action are not bound by a judgment or resulting determination of issues." 414 U.S. at 593, citing *Blonder-Tongue* v. *University Foundation*, 402 U.S. 313, 320-327 (1971).

Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969) is a more applicable and instructive decision. There this Court held, after a grant of certiorari to the Seventh Circuit Court of Appeals, that a parent company never designated as a party or served with process in an antitrust case could not be enjoined in a suit against one of its subsidiaries. This Court opined: "*It is elementary* that one is not bound by a judgment in personam resulting from

litigation in which he is not designated as a party or to which he has not been made a party by service of process." 365 U.S. at 110 (Emphasis supplied). This exact rationale is clearly applicable here, where Richards and Hill had no relationship whatsoever to the *Bedingfield* plaintiffs, and could not have been in privity with them. No *Bedingfield* plaintiff ever paid a penny to Jefferson County in occupational taxes, because the tax was simply not in effect on December 11, 1987 when the *Bedingfield* judgment was entered. (R. 36)

Had any *Bedingfield* plaintiff sought to attack the exemption scheme here under attack, he or she would have lacked standing so to do. *Eagerton* v. *Williams*, 433 So.2d 436, 447 (Ala. 1983). *Eagerton* logically held that an Alabama taxpayer is not a proper party plaintiff until he demonstrates an economic interest in the rights he seeks to protect. 433 So.2d, at 447.

In effect, the Alabama Supreme Court's failure to recognize fundamental cause of action and party identity differences between the plaintiffs here and those in the *Bedingfield* case, amounts to an attempted overruling of *Martin* v. *Wilks*, 490 U.S. 755 (1989) and a long line of cases in this Court which follow *Hansberry* v. *Lee*, 311 U.S. 32 (1940). These cases are summarized in *Martin, supra*:

> All agree that '[i]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.' *Hansberry* v. *Lee*, 311 U.S. 32, 40, 61 S.Ct. 115, 117, 85 L.Ed. 22 (1940). See, e.g., 762 *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 327, n. 7, 99 S.Ct. 645, 649, n. 7, 58 L.Ed.2d 552 (1979); *Blonder-Tongue Laboratories, Inc.* v. *University Foundation*, 402 U.S. 313, 328-329, 91 S.Ct. 1434, 1442-1443, 28 L.Ed.2d 788 (1971); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.* 395 U.S. 100, 110, 89 S.Ct. 1562, 1569, 23 L.Ed.2d 129 (1969). This rule is part of our 'deep-rooted historic tradition that everyone should have his own day in court.' 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure A 4449, p. 417 (1981) (hereafter 18 Wright). A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.
>
> — 490 U.S. at 762

Indeed, the white firefighters allowed to challenge employment decisions taken pursuant to consent decrees in *Martin* were not the total strangers to those decrees that Richards and Hill are to the *Bedingfield* case. Notices of hearings upon those consent decrees were published in local newspapers, and the Birmingham Firefighters Association (of which they were members) appeared at those hearings and filed objections. 490 U.S. at 759. Nevertheless, they were entitled to a day in court, not as a matter of civil procedure, but as a matter of right, 490 U.S. at 763, because:

> The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger... Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights." *Chase National Bank* v. *Norwalk*, 291 U.S. 475, 479 (1934).

Can this due process standard peacefully coexist with the Alabama Supreme Court's denial to Richards and Hill of rights enforceable under 42 U.S.C., § 1983? We think not.

CONCLUSION

Meritorious federal constitutional claims which have never been heard, and which could not have been heard in *Bedingfield* v. *Jefferson County, supra,* hang in the balance of this Court's consideration. We respectfully submit that these claims and these plaintiffs are sufficiently distinct from anything and everything embraced by *Bedingfield, supra,* to warrant reinstatement of the trial court's order that they be heard. We petition this Court for an order reversing the decision of the Alabama Supreme Court and remanding this action to a forum which will allow Richards and Hill a day in court. Otherwise, an asinine and patently unconstituional exemption scheme built into Jefferson County's occupational tax will be insulated forever from federal constitutional scrutiny.

Respectfully submitted,

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No. 95-386

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1995

JASON RICHARDS and FANNIE HILL,
Petitioners,

vs.

JEFFERSON COUNTY, ALABAMA and BIRMINGHAM-JEFFERSON CIVIC CENTER AUTHORITY,
Respondents.

On Writ Of Certiorari To The Supreme Court Of Alabama

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Due Process Clause of the United States Constitution permits *res judicata* (claim preclusion) or collateral estoppel (issue preclusion) to bar the relitigation of taxpayers' constitutional claims that were, or could have been, raised in prior litigation when the same claims are raised in subsequent litigation by taxpayers who, although not parties to the prior litigation, share an identity of interest with the taxpayers in the prior litigation, attempt to prosecute the same cause of action, and have no discernible private right involved in that cause of action.

2. Whether the Equal Protection Clause of the United States Constitution permits the Alabama Legislature to authorize Jefferson County to impose an occupational or license tax on those businesses, professions and occupations, and only those businesses, professions and occupations, not already required to pay such a tax under state law.

STATEMENT REGARDING PARTIES

The Certificate of Interested Persons in the Petitioners' Brief on the Merits omits Randy Godeke, the Director of Revenue of Jefferson County, who was a defendant in the proceedings below and continues as a nominal respondent in this case.

There are no parent or subsidiary companies of any corporation required to be identified pursuant to Rule 29.1 of the Rules of this Court.

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OPINIONS BELOW

The opinion of the Supreme Court of Alabama (J.A. 110) has not yet been reported in the Southern Reporter, 2d Series, which is the official reporter of Alabama appellate opinions. The order of the Circuit Court of Jefferson County (J.A. 105) is unreported.

JURISDICTION

The jurisdiction of this Court is based on 28 U.S.C. § 1257, instead of 28 U.S.C. § 1254 as erroneously stated in both the Petition for Writ of Certiorari and the Petitioners' Brief on the Merits.

STATUTORY PROVISIONS INVOLVED

Alabama Act No. 406, Ala. Acts 1967, and Jefferson County Ordinance No. 1120 are reported in their entirety at J.A. 33 and J.A. 34, respectively. The relevant provisions of the Alabama business license code are reproduced in the Appendix to the Brief of Respondents.

STATEMENT

In 1988 the County Commission (the "County Commission") of Jefferson County (the "County") imposed a general license tax (the "Occupational Tax") on natural persons pursuing any occupation within the County (subject to certain exemptions at issue in this case) in an amount equal to ½% of each taxpayer's employment compensation. The Occupational Tax was levied by Ordinance No. 1120 ("Ordinance No. 1120") (J.A. 34) adopted by the County Commission on September 29, 1987, and was to take effect on January 1, 1988. In imposing the Occupational Tax, the County Commission relied on the authority of Act No. 406 ("Act No. 406") (J.A. 33), enacted by the Legislature in 1967, and limited the tax in

accordance with the exemptions mandated by the act. This case arises from an action commenced by Petitioners Jason Richards ("Richards") and Fannie Hill ("Hill"), on behalf of themselves and other taxpayers similarly situated, contending that the exemptions from the Occupational Tax violated the equal protection clause of the United States Constitution. At the root of their claims are erroneous contentions (i) that there is no rational basis for the exemption of state-regulated professionals from the Occupational Tax and (ii) that a vast number of other people are exempt from the tax when, in fact, they are legally subject to the tax and have been paying it since its inception.

A. The Nature of the Challenged Exemptions. It is regrettable that both the Petition for Writ of Certiorari and the Brief on the Merits submitted by the Petitioners portray the exemptions mandated by Act No. 406 and implemented by Ordinance No. 1120 as a "cockamamie" and "bizarre" (Pet. for Cert. 7) "crazy salad exemption scheme" (Pet. Merits Brief, Quest. I, p.i) that is designedly devoid of all rationality. There are sound reasons, deeply embedded in both the historical and constitutional fabric of Alabama lawmaking, which explain and justify the exemptions challenged in this case. Unfortunately, these reasons were not adequately developed in the proceedings below because of the County's reliance on the preclusive effect of a prior judgment of the Alabama Supreme Court upholding the Occupational Tax, *Bedingfield v. Jefferson County*, 527 So. 2d 1270 (Ala. 1988); nor, perhaps, were they sufficiently brought to the attention of this Court prior to its grant of the Petition for a Writ of Certiorari. Nevertheless, this Court has taken jurisdiction of the Petitioners' equal protection claims, and the record of the case, together with the applicable laws, ordinances and public records of Alabama and the County, provide a sufficient basis for the Court's disposition of those claims. In considering the claims, however, it is desirable for this Court to understand the relevant legislative background of Alabama's business license taxes and Act No. 406.

The class of taxpayers exempted by Act No. 406 from any county tax authorized by the act was precisely the class of taxpayers upon which the state had imposed license taxes since 1927. Any taxpayer at any time subjected to a county tax pursuant to Act No. 406 was a taxpayer who had theretofore been fortunate enough to be exempt from any state or county business or occupational license taxes in Alabama. The "exemption scheme" attacked by the Petitioners represents in large measure the categories of businesses and professions selected for taxation by the Legislature of Alabama when, in 1927, it enacted Act No. 163 (named after its sponsor, the "Tunstall Act"; Ala. Acts, 1927, p.139), which was the precursor of Alabama's present business and professional license code.

B. State Policies Reflected in the Tunstall Act and Successor License Acts. Included in the Appendix filed with this Brief is an excerpt from *A History of Educational Finance in Alabama, 1819-1986*, by Dr. Ira W. Harvey, Professor of Education at the University of Alabama in Birmingham (Auburn University, 1989). Resp. Appndx. A-194. As a distinguished academic and former Assistant Director of Finance and Administration for the Alabama Department of Education, Dr. Harvey is a recognized expert on educational finance in Alabama and the related tax laws. Since the Journals of the Alabama Legislature record only actions taken without debate, and since there are no other official sources of legislative history, Dr. Harvey's research provides the only comprehensive record now available of how and why the Tunstall Act and the successor state license code—which constitute the legislative platform of Act No. 406—were enacted.

Alabama's financing of public education, compared with its sister states, is characterized by two anomalies: first, because of very low local property taxes, it finances its public schools with a relatively high percentage of state generated funds and, second, it safeguards those state funds for education by an elaborate system of constitutional and statutory earmarking that prevents their diversion for other governmental purposes. See *Childree v. Hubbert*, 524 So. 2d 336 (Ala. 1988). The main engine for the legal sequestration of educational taxes is the Alabama Special Educational Trust Fund ("ASETF"), to which all state taxes earmarked for public education are committed and from which all annual educational appropriations are made. The largest use by far of state tax revenues in Alabama is for public education, with the appropriations from the ASETF in the current fiscal year amounting to $3,331,000,000 (Ala. Acts, 1995, Act No. 95-748, p.1700), as compared with $862,000,000 from the general fund for the other obligations of state government, including Medicaid, social welfare, prisons and law enforcement (Ala. Acts, 1995, Act No. 95-740, p.1588).

In addition to providing the precursor of the state's business and professional license code, the Tunstall Act in 1927 created the ASETF and the earmarking of educational taxes therefor. The creation of the ASETF as an attempted solution to the then chronic underfunding of public education in Alabama is chronicled by Dr. Harvey. Resp. Appndx. A-194-202. As the result of public pressure and Governor Bibb Grave's adroit legislative strategy, the Tunstall Act was passed as a combination of (i) major business license taxes committed to the ASETF for public education and (ii) various minor business and professional license taxes for the support of general government. *Id.* A-200. The major business license taxes levied and earmarked for education included: taxes of 2.5% on

the gross receipts of intrastate business of railroads and the gross receipts of telegraph companies, telephone companies and express companies; taxes on the generation of hydroelectric power; production taxes on coal mining, iron ore mining and other mineral extraction; and a 15% tax on the wholesale price of tobacco products, Ala. Acts, 1927, pp. 139-148. The ASETF earmarking of such of these educational license taxes as remain in effect has been carried forward into present law. Ala. Code 1975, § 40-1-31. Dr. Harvey explains the combined purpose of the Tunstall Act as follows:

> In addition, this Act placed privilege and license taxes upon insurance companies, accountants, insurance adjusters, architects, attorneys, retail sales from railway cars, dentists, doctors, engineers, motor trucks, auto dealers and assorted other professional and business pursuits, including a tax of two cents per gallon on lubricating oil. The total revenue from this bill was estimated to yield about $4 million in its first year. Practically all of this revenue would be generated from those taxes earmarked to the Alabama Special Educational Trust Fund.

Id. A-202. With hyperbole that can be understood only in light of Alabama's historically sullen resistance to taxation, Dr. Harvey reports *(ibid.)* that Governor Graves celebrated the passage of what, in retrospect, was an extremely modest first step by proclaiming:

> This is Alabama's great day, her independence day. Today she is free and I thank God for this legislature that has done more for the rehabilitation of the state than any other in her history. (Montgomery Advertiser, July 15, 1927.)

As detailed in Dr. Harvey's account of interrelated tax and educational legislation for the legislative quadrennium beginning in 1935 (Resp. Appndx. A-245-260),

the ASETF and the license taxes levied by the Tunstall Act were modified and continued as part of a number of significant developments. A comprehensive revenue act was passed by the Legislature in 1935 (the "1935 Revenue Act"), which among other things (i) expanded the general revenue potential of the Tunstall Act by imposing state license taxes on a number of additional business and professional activities, (ii) levied personal and corporate income taxes pursuant to Amendment No. 25, which had been ratified as part of the Alabama Constitution in 1933, and (iii) adopted state taxation measures for banks and insurance companies that preempted their further taxation by counties and municipalities. Ala. Acts, 1935, No. 194, pp. 256-574. Driving the need for new revenues was the adoption in 1935 of long-needed laws for the improvement of public education, including a school minimum program, state provided textbooks, and supplemental appropriations for unpaid teachers' salaries. Resp. Appndx. A-253-260. With relatively minor revisions since 1935, the business and professional license provisions of the 1935 Revenue Act have been continued in effect and constitute the present state license provisions that, as mandated exemptions from taxes levied pursuant to Act No. 406, give rise to the present case.

Act No. 406, which was enacted when Alabama's Code of 1940 was in effect, authorizes the County "to levy a license or privilege tax upon any person for engaging in any business for which he is not required by law to pay any license or privilege tax to either the State of Alabama or the county by any of the following Article 1, Chapter 20, Title 51; Sections 176, 177, 178, 180, 182, 183, 184, 186, 429 and 826 in Title 51 of the Code of Alabama of 1940 as amended". J.A. 33. Article 1, Chapter 20, Title 51 of the 1940 Code is now codified as Article 2 of Ala. Code 1975, Tit. 40, Chap. 12, and for convenience has been reproduced in the Appendix to this Brief. Resp. Appndx.

A-17. The general provisions of the state license code relating to the levy and collection of the license taxes imposed by said Article 2, including the levy of "piggyback" taxes for counties, have also been included in the Appendix. Ala. Code 1975, Tit. 40, Chap. 12, Art. 1; Resp. Appndx. A-1. The separate state license taxes levied by the aforesaid Article 2—which constitute the bulk of the license taxes listed by the Petitioners to create the impression of the "crazy salad exemption scheme"—generally correspond to those taxes originally levied for general revenue purposes by the Tunstall Act and expanded by the 1935 Revenue Act.

A number of the state license tax provisions identified in Act No. 406 that, in 1967, would require exemptions from county taxation, namely, Sections 176, 177, 178, 180, 182, 183, 184 and 186 of Title 51 of the Code of Alabama of 1940, were the then surviving major license taxes originally imposed by the Tunstall Act on utilities and transportation companies to fund the ASETF for public education. To the extent that these license taxes have not been repealed or superseded by other taxes better adapted to modern conditions, they are now codified in Article 2 of Ala. Code 1975, Tit. 40, Chap. 21.[1] Resp. Appndx. A-113. At least as far back as the 1935 Revenue Act, counties in Alabama have been prohibited

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[1]The specific license taxes on utilities and transportation companies that were required to be exempt from county taxation under Act No. 406 are as follows: freight lines, Ala. Code 1940, § 51-176, now Ala. Code 1975, § 40-21-52; public utilities, Ala. Code 1940, § 51-177, now Ala. Code 1975, § 40-21-50; electric and gas utilities, Ala. Code 1940, § 51-178, now § 40-21-53; intrastate railroad business, Ala. Code 1940, § 51-180, recodified as Ala. Code 1975, § 40-21-57, but repealed in 1994; telephone business, Ala. Code 1940, § 51-182, recodified as Ala. Code 1975, § 40-21-58, but repealed in 1992; telegraph business, Ala. Code 1940, § 51-183, recodified as Ala. Code 1975, § 40-21-59, but repealed in 1992; and express companies, Ala. Code 1940 § 51-184, recodified as Ala. Code 1975, § 40-21-60.

from levying license taxes on utilities and transportation companies that were subject to state license taxes. Ala. Code 1975, § 40-21-64. Section 429 of said Title 51 recognizes the preemptive effect on county taxation of banks by the Financial Institution Excise Tax initially enacted as part of the 1935 Revenue Act and now codified as Ala. Code 1975, Tit. 40, Chap. 16. Resp. Appndx. A-95. This tax provides a unified state approach to the taxation of banks and, in exchange for the preemption of further county and municipal taxation of banks, provides for the sharing of the tax proceeds with counties and municipalities. § 40-16-6; Resp. Appndx. A-109. Likewise, Section 826 of said Title 51, now § 27-4-9 of the 1975 Code, merely recognizes the preemption of county taxes originally provided by the 1935 Revenue Act as part of the unified state taxation of insurance companies. Resp. Appndx. A-126.

Both the Tunstall Act and the 1935 Revenue Act reflected two state principles regarding the taxation of regulated professions that have been continued into the current state license code (Resp. Appndx. A-17), which, as explained above, provides the basis for the exemption of those professions from the Occupational Tax levied pursuant to Act No. 406. The first principle was that no portion of the state license taxes collected from professionals would be shared by the county in which such professionals were employed, nor would the county be authorized to levy a license tax on such professionals.[2] The second principle was that the state license tax should

[2]For example, compare the relevant language in the Tunstall Act relating to attorneys "Each attorney engaged in the practice of law shall pay an annual license of Fifteen Dollars ($15.00) to the State, but no license shall be paid to the county" (Ala. Acts, 1927, p. 153) with the corresponding provision of current law "Each attorney engaged in the practice of law shall pay an annual license tax to the state, but none to the county". Resp. Appndx. A-21.

be levied on the individual practitioner of a profession and not on the organization, whether corporation or partnership, that employed such practitioner.[3] Therefore, for purposes of applying the exemptions mandated by Act No. 406, it is clear that the state levies a license tax on the individual professional and not on the business organization employing such professional. Moreover, the county is specifically denied the right to impose license taxes on individuals practicing professions taxed by the state. The Occupational Tax has been structured by Ordinance No. 1120 to comply with these two principles.

As reported and analyzed by Dr. Harvey, two other developments occurred in the same time frame as the enactment of the 1935 Revenue Act that had far reaching effects on Alabama's efforts to finance public education. The first development was the enactment, in 1935, of a state income tax, as authorized by the ratification of Amendment No. 25 to the Alabama Constitution. Resp. Appndx. A-230-238. The state income tax became possible only after a long political and legal struggle. See *State v. Weil*, 232 Ala. 578, 168 So. 679 (1936). While initially committed to the retirement of an unfunded debt resulting from cumulative depression-induced deficits, in 1947 the proceeds of the income tax were earmarked for education by being constitutionally committed to the ASETF. Ala. Const., Amend. No. 61. The second important development was the enactment in 1936 and again in 1937 of general state sales taxes and the

[3]For example, compare the relevant language in the Tunstall Act relating to medical doctors "If such business is conducted as a firm or as a corporation in which more than one doctor is engaged, each doctor so engaged shall pay the license as above stated . . . " (Ala. Acts, 1927, p.155) with the corresponding provision of current law "If such business is conducted as a firm or as a corporation in which more than one person is engaged, each person so engaged shall pay the license tax as above stated." Resp. Appndx. A-57.

earmarking of the proceeds thereof for education through the ASETF. Like the state income tax, the realization of the state sales tax was beset by political and legal obstacles. Resp. Appndx. A-260-273; *Nachman v. State Tax Commission*, 233 Ala. 628, 173 So. 25 (1937). The income tax and the sales tax, both of which automatically reflect economic growth, quickly overshadowed the license taxes that had initially provided the ASETF with funds for education—the same license taxes that form the basis for exemption from county taxation under Act No. 406.

As a result of post World War II economic growth and the increasing revenues generated for education by the income tax and the sales tax, as well as the growth in other revenue sources for the state's general fund, Alabama has become less and less dependent upon its business and professional license taxes. Since businesses are now routinely taxed in various ways that appeared to be neither politically nor legally available to the state during most of the two decades prior to World War II, the state license taxes have generally not been updated to increase their revenue yield. Moreover, many of the activities selected by the 1927 Legislature and the 1935 Legislature undoubtedly have an anachronistic flavor today. It is fair to say that the Alabama license code today (Resp. Appndx. A-17) represents to some degree an economic and political snapshot of an essentially rural and undeveloped state prior to World War II. The retention in the current license code of quaint, obsolete or transient activities—such as flying jennies and merry-go-rounds, fortune tellers, palmists and clairvoyants, hat cleaning establishments, dog and pony shows, exhibitions of legerdemain, lighting rod installers, mule dealers, peddlers, and transient dealers and entertainers of various kinds—undoubtedly provides the Petitioners in this case with colorful material which they have used to portray the state

license code and, conversely, the exemptions mandated by Act No. 406, as a deliberate exercise in irrationality.

The Petitioners' approach, however, overlooks several important factors. The original enactment of the state license taxes that are protected from encroachment by Act No. 406 was a rational exercise of taxing power by the Alabama Legislature in response to severe state needs. Despite the survival of quaint and obsolete activities in the state license code, most of the businesses and professions taxed thereby continue to have vitality in the state's economy and can be rationally selected for taxation without violating the equal protection clause. Finally, the state license code continues to apply to those professions, both learned and otherwise, that are regulated by the state today, and consistent with the state's history in this regard, the code continues to deny to counties the power to tax such professions.

C. Relationship of State and County Taxation in Alabama. It is significant that the Legislature has persisted for more than sixty years in denying to counties the power to levy license taxes on professions regulated by the state. Under Alabama's constitutional structure, counties are regarded as instrumentalities of the state subject to direct legislative control, while municipalities, by contrast, are to a great degree constitutionally insulated from legislative intrusion. The primary instrument for legislative control of the counties is the enactment of local laws, or population bracket general laws of local application, that in either case apply to a single county. This structure is a reflection of times, prior to the modern state, when the counties were the only local agencies through which state government could act.[4]

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[4]The political jurisdiction of a county includes all municipalities located within its geographical territory.

On the other hand, with respect to legislative control of municipalities, the Alabama Constitution contains two powerful limitations on the use of local, special or private laws: first, Section 104 absolutely prohibits the Legislature from passing local, special or private laws relating to a number of subjects, among which are the incorporation of any municipality (Ala. Const., § 104(5)) and the alteration of the government of any municipality (*Id.* § 104(18)); second, Section 105 prohibits the Legislature from passing any local, special or private law in any case that is provided for by a general law. As a consequence of historical legislative rules and practices, laws applying to a single county or other political subdivision are easier to pass than general laws. Thus, the independence of municipalities from the Legislature is protected by the relative difficulty of trying to govern their affairs through the passage of general laws.

Because of this constitutional structure and legislative approach, counties in Alabama are governed by local laws to a much greater degree than are municipalities. Municipal governments are controlled by general laws, while county governments can be customized to legislative taste by local laws. See *Baldwin County v. Jenkins*, 494 So. 2d 584 (Ala. 1986). The same dichotomy of municipal independence versus county dependence is presented by Alabama's laws with respect to local taxation. For example, all municipalities in the state are empowered to levy a general sales tax, parallel to the state sales tax, for such purposes and at such rate as may be determined by the municipal governing body. Ala. Code 1975, § 11-51-200 *et seq.* By contrast, all counties depend upon local laws (or population bracket general laws of local application) for their authority to levy sales taxes, and, in the case of the County's sales tax, both the rate of the tax and the purposes for which the proceeds may be used

are dictated by the Legislature. Ala. Acts, 1967, Act No. 405, p. 1021; Ala. Acts, 1973, Act No. 659, p. 998.

The lack of any taxing authority conferred by general law carries over into the levy of business license taxes by counties. Since 1907, every municipality in the state has possessed the power under a general municipal license statute to impose license taxes on all businesses, professions and occupations conducted in such municipality at such rates and for such purposes as may be determined by the municipal governing body. Ala. Code 1975, § 11-51-90; Resp. Appndx. A-163. The City of Birmingham, the largest city in the County, has long used the municipal license statute to levy license taxes on various business and professions, including professions, both learned and otherwise, that are regulated by the state. Since municipal taxation, unlike county taxation, has historically and constitutionally been treated as independent of state taxation, municipalities have not been prohibited from taxing the state-regulated professions. Excerpts from the Birmingham license code have been included in the Appendix to this Brief to show the relative economic burden of the Birmingham license tax on representative professions. Resp. Appndx. A-176.

The municipal license statute was first used in 1957 by a municipality to levy a general occupational tax. *Estes v. City of Gadsden*, 266 Ala. 166, 94 So. 2d 744 (1957). In 1970, the City of Birmingham, which is located within the County, used this statute to levy a one percent occupational tax, which continues in effect today and which, like the provisions of the Occupational Tax of the County challenged by Hill in this case, exempts the wages of domestic servants employed in private homes. *Jolly v. City of Birmingham*, 55 Ala. App. 603, 318 So. 2d 300 (Ala. Civ. App. 1975). Except for the exemptions mandated by Act No. 406, the Occupational Tax closely parallels the occupational tax levied by the City of Birmingham; the

city's tax ordinance, No. 70-75, is included in the Appendix to this Brief for comparison. Resp. Appndx. A-165.

By contrast with municipalities, the County had no legal authority to levy license taxes on businesses and professions until the enactment of Act. No.406. In keeping with the state control of county finances, however, the Legislature provided in the 1935 Revenue Act for a "piggyback" license tax to be levied for the benefit of each county in an amount equal to 50% of the state license taxes collected in such county. This license tax sharing arrangement continues in effect today.[5] Ala. Code 1975, § 40-12-2; Resp. Appndx A-1. In keeping with prior policy, the levy of "piggyback" license taxes for the counties did not extend to the state-regulated professions, as to which the state continued to deny the counties the power to tax.

D. Original Purpose of Act No. 406. Even though the 1935 Revenue Act levied license taxes for the County paralleling state license taxes (except with respect to regulated professions), by 1967 it had become apparent that, however comprehensive the state license code might have been in 1935, many businesses in the County did not fit into the classifications of the state license code and were therefore escaping all county license taxation. The legislatively stated purpose of Act No. 406 was "to equalize the burden of taxation by authorizing the county to impose a license or privilege tax upon persons now engaging in certain businesses without paying any license tax thereon to either the state or county." J.A. 33. For the fiscal year following the effective date of Act No. 406, the County adopted a business license code that imposed license taxes on all businesses that did not fall

[5]In 1955, the Legislature provided that the total license taxes collected in each county would be equally divided between the state and the county, even though the total collected remained at 150 percent of the base state rate. Ala. Code 1975, § 40-12-3.

within the excluded categories of Act No. 406 as explained above, namely, (i) the businesses already paying a license tax to the state and a "piggyback" license to the County, (ii) the regulated professions licensed by the state, and (iii) the utilities, transportation companies, banks and insurance companies that, going back to the Tunstall Act, had paid license taxes for the ASETF or that were subject to a unified state tax. The business license code of the County represented the first application of Act No. 406; that code, in its present form, Ordinance No. 1172, is included in the Appendix to this Brief. Resp. Appndx. A-127. Except for the excluded professionals licensed by the state and the excluded utilities, transportation companies, banks and insurance companies, the County's business license code is the reciprocal of the state license code—that which is taxed under one is not taxed under the other, but together they provide, with the noted exceptions, a comprehensive scheme of business license taxation in the County.

E. Interpretation of Ordinance No. 1120 and Application of the Occupational Tax. Like the municipalities that failed to realize until 1957 the possibility of levying an occupational tax under the general municipal license statute (Ala. Code 1975, § 11-51-90), *Estes v. City of Gadsden, supra*, the County, for 20 years, did not attempt to levy an occupational tax. Confronted by a fiscal emergency in 1988, the County recognized that, like the taxing powers of municipalities under § 11-51-90, it had the right to levy an occupational tax under Act No. 406. That right was challenged and decided in favor of the County by *Bedingfield v. Jefferson County, supra.* By the terms of Ordinance No. 1120 (J.A. 34), the Occupational Tax applies only to the privilege of employment by a natural person who is not required to pay a license tax (i) to either the state or the County under any of the license tax provisions identified in Act No. 406 or (ii) to the

County under its business license code. As succinctly and correctly interpreted by the Alabama Supreme Court in *Bedingfield*:

> Ordinance No. 1120 levies a license or privilege tax on natural persons engaged in any vocation, occupation, calling, or profession who are not required by law to pay any license or privilege tax to the state or county.

J.A. 66. The Occupational Tax applies to natural persons; it does not apply to businesses conducted by legal entities other than individual proprietorships. Ordinance No. 1120 does not exempt a natural person from the Occupational Tax unless he conducts a business as a proprietorship that is subject to a state or county license or unless he pursues a profession or occupation where he is individually required to be licensed by the state. For example, a banker or person working for a bank would not be exempted from the Occupational Tax by Ordinance No. 1120 unless, like the Rothschilds in the early 19th century, he conducted a banking business as a proprietorship, which today would not be permitted by either federal or state law. Ordinance No. 1120 exempts from the Occupational Tax only those natural persons (i) who are employed as domestic servants in private homes, (ii) who constitute a relatively inconsequential group, like peddlers, fortune tellers and entertainers, doing business as proprietorships and paying a state license tax, and (iii) who practice a state-regulated profession and who, pursuant to long-standing policy, are required to obtain licenses directly from the state. See pp. 8-9 above.

F. Incorrect Statements of the Petitioners Regarding Taxpayers Subject to the Occupational Tax. Pursuant to the express terms of Ordinance No. 1120 and the interpretation thereof expressed by the Alabama Supreme Court in *Bedingfield*, the County, without legal challenge other than this case, has been collecting the Occupational Tax from almost all natural persons employed by business entities, whether organized as corporations, partnerships or otherwise, engaged in the businesses enumerated in the Petitioners' Brief on the Merits as being favored by the so-called "exemption scheme." Pet. Br. 5-7. While such business entities do not pay the Occupational Tax, their employees most certainly do. The only employees of such business entities who are exempt from the Occupational Tax are those, such as accountants, lawyers and engineers, who practice a state-regulated profession and individually are required to obtain a state license.

To the Respondents' best knowledge, the Petitioners did not fully reveal their profound misunderstanding of the application of the Occupational Tax until the submission of their Brief on the Merits to this Court. Nowhere in the proceedings below can the Respondents find a statement—whether in the Petitioners' complaint, other court filings or their brief to the Alabama Supreme Court—that suggests, much less expresses, the Petitioners' erroneous belief that if a business entity pays a license tax to the state and is therefore exempt from further county taxation under Act No. 406, then all employees of such business entity are exempt from the Occupational Tax. There is nothing in the record of this case to justify this error; it is based entirely on the Petitioners' misreading of the applicable laws and ordinances. Admittedly, the error was first adumbrated by the sentence in the Petition for Writ of Certiorari, p. 7, that reads "It is an exemption scheme which completely *exempts* a bizarre collection of persons who happen to be employed by or as (emphasis supplied):" and is then followed by the Petitioners' list of business entities subject to state license taxes.

Only with the submission of the Petitioners' Brief on the Merits, however, was the enormity of their misconception made clear by the following statement:

> More significant even than the licensees, however, are the employees of insurance companies, express companies, railroads, banks and public utilities, who purchase no licenses, pay nothing whatsoever to the state or the county, but receive complete exemption from the tax. *Code of Ala.*, 1975, § 40-21-50, 40-21-52, 53, 54 and 55; 40-21-57, 58, 59 and 60; 40-16-6; 27-4-9. (R.337) Pursuant to a definitional exemption grant (describing who will and will not pay its occupational tax) Ordinance No. 1120, Section 1(B), Jefferson County completely exempts, without explanation, all employees of these powerful business interests without requiring licensure, or payments of any kind to the state or the county. (R. 337)

Pet. Br. 8. This view of the Occupational Tax is completely and irremediably wrong; it appears to be based upon comprehensive and interrelated misinterpretations of the relevant state license laws, Act No. 406 and Ordinance No. 1120. Moreover, it is internally inconsistent with Richards' own complaint. On page 5 of the Petitioners' Brief it is claimed that "[t]otally exempted from the tax are persons who happen to be employed by or as:" and this claim is followed by a list of exempt business entities that, on the tenth line of the list, includes "attorneys". Since Richards is employed by attorneys as a "law firm courier" (J.A. 2; Pet. Br.5) and since, according to the Petitioners' Brief, persons employed "by or as" attorneys are exempt from the Occupational Tax, it must be concluded that Richards has contradicted the gravamen of his own complaint.

Even though the Petitioners' characterization of the "exemption scheme" of the Occupational Tax is discredited by its facial inconsistency with Richards' complaint, because of the magnitude of the error and its potential impact on the equal protection issue before this Court, the Respondents have included in the Appendix to this Brief a sworn declaration of the Director of Revenue of the County showing statistical information from the public records of the County. Resp. Appndx. A-185. Whereas the Petitioners wrongly claim that "the employees of insurance companies, express companies, railroads, banks and public utilities . . . purchase no licenses, pay nothing whatsoever to the state or the county, but receive complete exemption from the tax" (Pet. Br. 8), the truth, as demonstrated by the statistics in the exhibit to this declaration (Resp. Appndx. A-188), is that the Occupational Tax is imposed upon a large percentage of the total wages of employees of utilities, banks, insurance companies and other businesses whose employees are mistakenly claimed by the Petitioners to be exempt. The principal reasons for wages not being taxed are (i) professional licenses obtained from the state and (ii) work performed outside the County. The statistics do clearly show that smaller percentages of gross wages are subject to the Occupational Tax in the case of organizations employing licensed professionals, such as large medical clinics, accounting firms and law firms. When correctly understood as it is both written and applied, Ordinance No. 1120 taxes the employment of all natural persons except domestic servants employed in private homes, unless those persons are individually required to obtain a license from the state. To be exempt from the Occupational Tax, an individual must be required by law to obtain directly from the state an individual license; no exemption for an individual results from the mere fact that he happens to

work for a business entity that is itself exempt from county license taxation.

G. Additional License Taxes and Fees Imposed by State on Regulated Professions. The Petitioners evade the issues of whether the state has any legitimate purpose in denying to the County the power to levy a license tax on such professionals and whether the resulting exemption from the Occupational Tax is rationally related to that purpose. The Petitioners contend only that it is unfair for citizens pursuing unregulated occupations to pay the tax while successful professionals are not so encumbered; the state license tax is not a sufficient *quid pro quo* to justify exemption from the Occupational Tax. This approach ignores the fact that the state license code does not represent the full extent of state regulation nor the full measure of financial burdens associated with such regulation.

With inconsequential exceptions, all individuals directly licensed by the state and therefore exempted from the Occupational Tax by Act No. 406—including even practitioners of such non-learned professions as auctioneers, appraisers, barbers, contractors, cosmetologists, embalmers, pool hall operators and real estate brokers—are subject to comprehensive state regulatory laws. See Ala. Code 1975, Tit. 34, Professions and Businesses. With respect to all the learned professions, and to varying degrees, the non-learned professions as well, these laws create regulatory bodies with oversight responsibility, provide for examinations and initial and renewal licenses, and in general require each profession to be conducted with appropriate standards of competence and honesty for the protection of the public. The regulatory laws for these professions provide for the assessment of additional license taxes and fees that are generally devoted to defraying the cost of regulation. The increasing cost of regulation has been reflected in periodic revision of the

these laws, with the result that correspondingly little change has been made in the state license code. Resp. Appndx. A-17.

H. The Case of *Bedingfield v. Jefferson County*. After the adoption of Ordinance No. 1120 by the County Commission (September 29, 1987), but prior to its scheduled implementation, Hoyt Bedingfield ("Bedingfield"), then Director of Finance of the City of Birmingham, acting in his official capacity and as a taxpayer of the County, brought an action against the County in circuit court seeking a declaratory judgment that the Occupational Tax was invalid on several statutory and constitutional grounds. J.A.44. On November 4, 1987, additional taxpayers of the County (collectively "Phillips") filed a separate declaratory judgment against the County also challenging the validity of the Occupational Tax. J.A. 49. The actions brought by Bedingfield and Phillips were consolidated. J.A. 59.

Apart from claiming that Ordinance No. 1120 was not authorized by Act No. 406, Bedingfield challenged Act No. 406 as being in violation of both state constitutional provisions and the federal equal protection clause: "Act 406 is a violation of the equal protection requirements and provisions of the federal and state constitution." J.A. 47. Phillips was more specific, stating that Act No. 406:

> constitutes a denial of equal protection in violation of the Fourteenth Amendment of the United States Constitution. Said Act exempts professional occupations required by State law to be licensed but does not exempt other professional or nonprofessional occupations.

J.A. 52. The consolidated Bedingfield action involved the federal equal protection clause in two ways: first, as stated by Phillips, it could be argued that Act No. 406 created unconstitutional classifications of taxpayers; and second,

it could be argued that since Act No. 406 applied only to counties of more than 500,000 in population, it made an irrational classification among Alabama cities in expanding the County's taxing power.[6] Although the Bedingfield plaintiffs raised the first equal protection argument in their complaint, they appear to have neglected it in favor of the second argument. J.A. 54. Whether as the result of neglect or unpersuasive arguments, the trial court upheld the Occupational Tax in an order that expressly addressed the second argument but failed to discuss whether the exemptions from the tax reflected an impermissible classification of taxpayers under the equal protection clause. J.A. 60.

On appeal to the Alabama Supreme Court, the Bedingfield plaintiffs raised the issue of federal equal protection, but again focused their attention on the argument that Act. No. 406 unconstitutionally differentiated between Jefferson County and other counties in the state. R. 272-75. The Alabama Supreme Court was not unaware of the equal protection argument concerning the taxpayer exemptions because it was presented by the amicus brief filed by the Alabama AFL-CIO (R. 289). Nevertheless, the Court upheld the Occupational Tax in an opinion that expressly addressed all state law issues and the equal protection challenge to the population classification of Act. No. 406, but without discussing whether the

[6] *Peddycoart v. City of Birmingham*, 354 S.2d 808 (Ala. 1978), infused new vigor in the state constitutional barriers to local acts masquerading as general acts by reason of population classifications. It recognized the utility, however, of preserving certain open population bracket laws against such barriers, provided that the population classifications were rationally related to a legitimate purpose. Thus, in order to avoid being a local law under the Alabama Constitution, and therefore subject to certain specific constitutional restrictions, *Peddycoart* required the population classification of Act No. 406 to pass muster under the federal equal protection clause.

exemption of state-regulated professions violated the federal equal protection clause. J.A. 65.

In reliance upon the holding of *Bedingfield v. Jefferson County*, the County has collected and spent the Occupational Tax, which has been continuously in effect since January 1, 1988. Moreover, the County in 1989 pledged proceeds of the tax to the Birmingham-Jefferson County Civic Center Authority (the "Authority") in an annual amount of $10,000,000 for 20 years. Those pledged proceeds, together with $3,000,000 per year pledged by the City of Birmingham from its occupational tax, constitute the sole source of payment of the Authority's 1989 capital improvement bonds now outstanding in the amount of $109,915,000.

I. The Proceedings Below. On April 21, 1992, Richards and Hill, together with George David Dykes and Joan Foley Dykes (together, the "Dykes"), who are employees of the United States, commenced this case in circuit court as a class action against the County and the County's Director of Revenue, pursuant to 42 U.S.C. § 1983, challenging the validity of the Occupational Tax on various federal and state constitutional and statutory grounds.[7] J.A.1. Richards and Hill claim to represent all citizens who are not federal employees and who are subject to the Occupational Tax, while the Dykes claim to represent all federal employees who are subject to the Occupational Tax. All the plaintiffs alleged that their liability for the tax violated the federal equal protection clause of the United States Constitution and the due process and equal protection provisions of the Alabama Con-

[7] On August 19, 1991, the same plaintiffs brought a case in the United States District Court asserting claims identical to those asserted in this case. The federal case was dismissed on April 15, 1992, on the grounds that it was barred by the Tax Injunction Act, 28 U.S.C. § 1341. *Richards v. Jefferson County*, 789 F. Supp. 369 (N.D. Ala. 1992), aff'd without opinion, 983 F.2d 237 (11th Cir. 1992).

stitution. J.A. 10, 11, 13. In addition, the Dykes alleged that their liability for the tax violated 4 U.S.C. 111 requiring nondiscriminatory state and local taxation of federal employees and state law pertaining to the taxation of federal employees. J.A. 9, 12. The Authority moved to intervene because of its interest in the Occupational Tax as the source of payment of its bonds. J.A. 22. The County moved for summary judgment on the ground that *Bedingfield* constituted a *res judicata* bar to further litigation of all claims (other than those under 4 U.S.C. § 111). The trial court ultimately granted summary judgment against all plaintiffs on the state law claims, but it denied summary judgment with respect to their federal constitutional claims, as well as the Dykes' claim under 4 U.S.C. 111. J.A. 105.

In response to the County's request for certification of questions for an interlocutory appeal (J.A. 99; Ala. R. App. P. 5), the trial court certified the following: (i) whether the federal constitutional claims of the plaintiffs were barred by *res judicata* and (ii) whether Act. No. 406 denied the plaintiffs the equal protection of the laws under the United States Constitution. J.A. 106. In deciding the interlocutory appeal, the Alabama Supreme Court held that *res judicata* barred further litigation of the plaintiffs' federal constitutional claims, pretermitting any consideration of the equal protection question. J.A. 110. Richards and Hill filed a petition for a writ of certiorari with this Court seeking review of (i) the Alabama Supreme Court's decision that the Petitioners' federal constitutional claims were barred by *res judicata* and (ii) a determination as to whether the exemptions from the Occupational Tax warrant further litigation on equal protection grounds. This Court granted the petition with respect to both isues.

SUMMARY OF ARGUMENT

It is well established that a prior judgment obtained by private citizens should be given preclusive effect with respect to subsequent litigation by different private citizens if the prior litigation does not involve any private interests, the right sought to be enforced is a public right, and the people are regarded as the real party in interest. Privity between the prior litigants and those precluded from litigation of the same public issue is created by their identity of interest in the public issue. The equal protection claims raised by the *Bedingfield* plaintiffs concerning the exemptions from the Occupational Tax caused such claims to be decided in *Bedingfield*, even though the trial court and the Alabama Supreme Court failed to discuss the claims in their opinions. The Petitioners cannot claim any private right with respect to their equal protection claims that differentiate them from the *Bedingfield* plaintiffs or any other taxpayers, and this identify of interest creates the necessary privity to preclude further litigation of their equal protection claims in this case.

Legislative bodies such as the County hold broad power — to be exercised in their discretion — to make classifications for tax purposes. Such is the deference due that exercise of legislative discretion that a tax-related classification will not be disturbed by this Court if there is any conceivable basis on which to sustain it. That rule is well-established, has often been applied by this Court, and is controlling in this case.

Although the taxpayer bears the heavy burden of eliminating every conceivable basis that may lawfully have animated the challenged legislation, the Petitioners have offered the Court only inapposite judicial authority and conclusory assertions in pursuit of that burden. Richards has not identified any act of invidious discrimination, nor has he offered relevant authority or analysis, to support and explain his assertions.

Finally, there are a number of conceivable bases legitimizing the classification decisions attacked. The establishment of the Occupational Tax involved, essentially, only a judgment to tax all natural persons not already so taxed. The Legislature acted with reference to an existing set of circumstances, and they acted reasonably in light of those circumstances. Additionally, the business and professional licensing tax law developed reasonably, with a plausible purpose behind every aspect of it. Finally, the distinction made between state-regulated professionals and other employees in Jefferson County, in addition to being a classical exercise of the discretionary classification power, can be justified from several conceivable perspectives, including the decision of the state to retain exclusive regulatory control over the learned professions, as well as other professions historically regulated by the state.

ARGUMENT

I. ***Bedingfield v. Jefferson County* should bar the Petitioners from further litigating whether the exemptions from the Occupational Tax violate the equal protection clause of the United States Constitution.**

The *res judicata* issues of this case put the Respondents in mind of Mr. Justice Holmes' opening observations in his dissent in *Northern Securities Co. v. United States*, 193 U.S. 197, 400 (1904):

> Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

From the perspective framed by their risks, this is certainly a case of "great" importance for the County and the Authority. The very pendency of the case has caused outstanding obligations of both the County and the Authority to be scrutinized by the national rating services and, in the case of the Authority, to be placed on the rating services' credit watch. If the Occupational Tax is ultimately determined to be constitutionally invalid, the County will lose more than one-third of the revenues for its general fund, and it will face the prospect of refunding more than $273,000,000 in Occupational Taxes that, within the applicable statute of limitations, have been collected and spent on diverse functions of government.

There is simply no way that the County could meet its current governmental responsibilities, while at the same time absorbing the loss of the Occupational Tax and financing a refund of the cumulative taxes collected and spent since January 1, 1988.[8] In the event of the loss of the $10,000,000 per year of Occupational Taxes that the County has pledged for the payment of the Authority's bonds, the Authority will simply have to default in the payment of these bonds, for it has no taxing authority and derives no significant income from a Civic Center that was built not for financial profit but to promote the economic and cultural development of the Birmingham-Jefferson metropolitan area. The greatness of this case is

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[8]Alternatively, the County might remedy the retroactive effect of an invalidation of the Occupational Tax, *Harper v. Virginia Dept. of Taxation*, 113 S.Ct. 2510 (1993), by "withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 818 (1989). This would involve the daunting political challenge of persuading the Alabama Legislature to impose retroactively the Occupational Tax on the cumulative compensation received by professionals working in the County since January 1, 1988, as well as abandoning for the future the long-standing policy of denying counties the power to levy license taxes on such professionals.

in the ruin that its outcome could visit on the County and the Authority.

In fairness, however, the Respondents recognize that this case is also a "hard" case in the sense that it potentially puts into conflict several fundamental principles deeply embedded in this nation's jurisprudence: first, the concept of due process of law that assures everyone his own day in court and does not allow his personal rights to be concluded by proceedings in which he was neither a party nor represented; second, the continued coherence of the doctrine of *res judicata* which reduces litigation and fosters confidence in the judicial process by safeguarding the reliability of judgments; and, third, the need for finality concerning the legal validity of revenue sources for state and local governments, especially in the complex contemporary world where citizens depend upon reliable governmental budgets for their livelihood, health and safety and where investors in a global market buy and trade municipal securities without opportunity for constant inquiry into their underlying legal risk.[9] By adverting to the great and hard nature of this case and by recalling Mr. Justice Holmes' observation about the associated risk of bad law, the Respondents do not suggest, by any means, that the judgment of the Alabama Supreme Court in this case is bad law. On the contrary, that judgment clearly reaches the correct result in the particular circumstances of this case, even if there is arguably some evidence of the "hydraulic pressure" for which Mr. Justice Holmes had a cautionary concern.

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[9]To some degree, concern for this last principle appears to have animated Congress in the enactment of The Tax Injunction Act, 28 U.S.C. § 1341, which this Court has described as "first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Rosewell v. La Salle Nat'l Bank*, 450 U.S. 503, 522 (1981).

In its decision in this case, the Alabama Supreme Court followed well established precedent, both in Alabama and many other states, to the effect that, in the absence of fraud or collusion, a citizen can obtain a binding judgment on all other citizens in a case where no private interest is involved, the right sought to be enforced is a public right, and the people are regarded as the real party in interest. *Town of Tallassee v. State ex rel. Brunson*, 206 Ala. 169, 89 So. 514 (1921); *City Council of Montgomery v. Walker*, 154 Ala. 242, 45 So. 586 (1908). With respect to the vital question of how the first party in such litigation can bind a party who subsequently attempts to litigate the same public issue, the answer has been that the privity of the parties results from their identity of interest in the same public question. Whether called virtual representation or identity of interest, the privity between the parties for purposes of *res judicata* is pragmatically established by recognizing that no real due process interest is served by permitting a public issue, once adequately adjudicated through the competent efforts of bona fide adversaries, to be subsequently relitigated by other parties who have the same interest in the question and will be affected by the outcome in the same way.

The decisions of many state courts agree with the Alabama cases.[10] The rule of privity commonly applied in such cases is well expressed by the Supreme Court of Georgia:

> Where a taxpayer or property owner brings an action against a county or its officers upon a matter of public and general interest to all

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[10]*E.g., El Paso Natural Gas Co. v. State*, 599 P.2d 175 (Ariz. 1979); *Wells v. Heath*, 602 S.W.2d 665 (Ark. 1980); *Howard-Sevier Road Imp. Dist. No. 1 v. Hunt*, 265 S.W. 517 (Ark. 1924); *Farncomb v. City and County of Denver*, 171 Pac. 66 (Colo. 1918); *Johnson v. City of Alma*, 149 S.E.2d 661 (Ga. 1966); *Holman v. Bridges*, 140 S.E. 886 (Ga. 1927);

> other taxpayers of such political subdivision, and the action either expressly or by necessary implication is on their behalf, they are equally bound by the adjudication and a judgment is a bar to any subsequent proceeding by them or any of them seeking similar relief upon the same facts.

Johnson v. City of Alma, 149 S.E. 2d 661, 663 (Ga. 1966). Recognizing the necessity for a different approach when a private right of a citizen may be involved in subsequent litigation, the Supreme Court of Ohio stated the principle as to matters of general public interest as follows:

> Appellant essentially argues that as a taxpayer he has a private right, independent of the Bratenahl board of education, to relitigate the same public issue determined against the board. This may be true where causes of action are not the same or where the taxpayer has a different private right not shared in common with the public; however, a judgment for or against a governmental body is binding and conclusive as

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Riley v. Maloney, 499 N.W. 2d 18 (Iowa 1993); *People ex rel. Castle v. Wright*, 134 N.E.2d 269 (Ill. 1956); *Harmon v. Auditor of Public Accounts*, 13 N.E. 161 (Ill. 1887); *Ahlquist v. Commonwealth Electric Co.*, 261 N.W. 452 (Minn. 1935); *Kaufer v. Ford*, 110 N.W. 364 (Minn. 1907); *Seibert v. City of Columbia*, 461 S.W.2d 808 (Mo. 1970); *Powell v. City of Joplin*, 73 S.W.2d 408 (Mo. 1934); *Drainage Dist. No. 1 Reformed v. Matthews*, 234 S.W.2d 567 (Mo. 1950); *State ex rel. Sullivan v. School Dist. No. 1*, 50 P.2d 252 (Mont. 1935); *Roberts v. Goldner*, 397 A.2d 1090 (N.J. 1979); *Gardiner v. City of Jersey City*, 170 A.2d 820 (N.J. Super 1961); *Anderson v, Jeannotte*, 96 N.W.2d 591 (N.D. 1959); *State ex rel. Davis v. Willis*, 124 N.W. 706 (N.D. 1910); *City of El Reno v. Cleveland-Trinidad Paving Co.*, 107 Pac. 163 (Okla. 1910); *City of Cincinnati ex rel. Crotty v. City of Cincinnati*, 361 N.E.2d 1340 (Ohio 1977); *Stromberg v. Bd. of Ed. of Bratenahl*, 413 N.E.2d 1184 (Ohio 1980); *State ex rel. Brophy v. City of Lakewood*, 41 N.E.2d 856 (Ohio 1942); *Sica v. City of Philadelphia*, 465 A.2d 91 (Pa.Cmwlth. 1983); and *Stallcup v. City of Tacoma*, 42 Pac. 541 (Wash. 1895).

> *res judicata* on all residents, citizens and taxpayers with respect to matters adjudicated which are of general and public interest.

Stromberg v. Bd. of Ed. of Bratenahl, 413 N.E. 2d 1184, 1186 (Ohio 1980).

Since this doctrine of virtual representation deviates from the general rule that a judgment binds only parties before the court, or those who by participation, legal accountability or successive interest can justly be deemed in privity with such parties, the use of the doctrine to justify *res judicata* in a particular case "demands the utmost caution." *El Paso Natural Gas Co. v. State of Arizona*, 599 P.2d 175, 178 (Ariz. 1979). In the present case, the Petitioners contend that their federal constitutional claims cannot be barred by *Bedingfield* because the taxpayers in that case did not raise, and the court did not decide, whether the exemption of certain classes of taxpayers from the Occupational Tax violated the equal protection clause. Assuming arguendo the requisite privity between the *Bedingfield* plaintiffs and the Petitioners, the Alabama Supreme Court, after speculating that the claims were actually litigated because they had been raised in the *Bedingfield* complaints, definitively solved the problem by invoking the claim preclusion breadth of *res judicata*, which would bar the Petitioners from further litigating not only the matters actually decided but all other "legal theories and claims arising out of the same nucleus of operative fact." J.A. 114. Claim preclusion forces the prior litigant to present all evidence, theories, arguments and remedies related to his cause of action on pain of subsequent forfeiture. *Nevada v. United States*, 463 U.S. 110 (1983); *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316 (1927). While this rule is fair and reflects good policy where the forfeiting party is the prior litigant or his clear privy, it arguably goes too far in circumstances, such as this case, where privity between *Bedingfield* and the Peti-

tioners results only from the identity of interest in a particular public question.

A. Due process would be better served by using issue preclusion rather than res judicata to bar further litigation of the Petitioners' equal protection claims.

Without changing the result, the decision of the Alabama Supreme Court in this case would be more defensible under due process standards if it were interpreted as barring further litigation of the Petitioners' equal protection claims on the basis of issue preclusion. Even though the Petitioners may escape the broadside effect of *res judicata*, their effort to relitigate the public issue of whether the Occupational Tax violates the equal protection clause—an issue applying to them, to the *Bedingfield* plaintiffs, and to all county taxpayers in the same way—should be barred if that issue was actually decided in *Bedingfield* and was necessary to support the judgment in that case.

The issue of equal protection covering the exemptions from the Occupational Tax was clearly raised in the consolidated *Bedingfield* complaint, but the Petitioners argue that it was not decided because neither the trial court nor the Alabama Supreme Court addressed it in their written opinions. The identical argument was considered by the Court in *Grubb v. Public Utilities Commission of Ohio*, 281 U.S. 470, 477 (1930):

> But the argument is not sound. The question of the constitutional validity of the order was distinctly presented by the appellant's petition and necessarily was resolved against him by the judgment affirming the order. Omitting to mention that question in the opinion did not eliminate it from the case or make the judgment of affirmance any the less an adjudication of it.

As is clear from the Court's disposition later in the opinion of a claim not raised in the prior proceeding, the above quoted language is not merely another way of phrasing the claim preclusion of *res judicata*, but is rather a rule for determining whether an issue was actually decided. The same rule for determining issues actually decided was more memorably expressed by Judge Goodrich in *United States v. Silliman*, 167 F.2d 607, 617 (3rd Cir. 1948):

> It actually does not matter whether such evidence was presented or not. If an issue is raised and the party who has the burden fails in his proof and the issue is decided against him, he is just as much bound by collateral estoppel as though he had presented a barrel of testimony. A man cannot offer his cake and expect to keep it in litigation any more than anywhere else.

Bedingfield clearly decided that the exemption classification of the Occupational Tax did not violate the equal protection clause, and the Petitioners are bound thereby if their interest in that issue is identical to that of the *Bedingfield* plaintiffs.

B. For purposes of precluding further litigation of the federal equal protection claims, the Petitioners are in privity with the Bedingfield plaintiffs.

No one would dispute the fairness or good sense of the principle vindicated by *Martin v. Wilks*, 490 U.S. 755 (1989), "that a person cannot be deprived of his legal rights in a proceeding to which he is not a party." *Id.* at 759. The Petitioners would certainly be protected from the preclusion of their federal equal protection claims in this case if they could demonstrate any conceivable set of facts that would make their claims any different than the claims of other taxpayers who pay the Occupational Tax and object to its exemptions. They cannot, however, dif-

ferentiate their claims from those of the *Bedingfield* plaintiffs or any other taxpayers. Permitting them to circumvent the bar of *Bedingfield* by claiming an illusory private right will create opportunity for wasteful litigation that is not required by due process of law.

In their complaint the Petitioners acknowledge that they have no private rights or claims with respect to the Occupational Tax that arise under the equal protection clause and that are different from the rights and claims of other taxpayers. With respect to their right to represent all taxpayers, the Petitioners assert:

> There are common questions of law and fact in the action that relate to and affect the rights of each member of the classes represented by the named plaintiffs and the relief sought is common to both classes, namely a declaration that the occupational tax is unconstitutional.

J.A. 4. They further claim that the claims of all taxpayers "depend on a showing of the unconstitutionality of the occupational tax in a manner which is beneficial to each" and that "[t]here is no conflict as between any individual named plaintiff and any other member of either class with respect to this action, or with respect to the relief sought herein." J.A. 4. Two observations are in order. First, since the *Bedingfield* plaintiffs are included among the taxpayers which the Petitioners purport to represent, there is an explicit acknowledgment that their interests are the same as the *Bedingfield* plaintiffs. That means that if the Petitioners are given the right to relitigate, *res judicata* means nothing with respect the *Bedingfield* plaintiffs. Second, if the Petitioners do have any private right that requires a separate day in court, how can they be sure that it does not conflict with the private rights of the thousands of anonymous taxpayers they seek to represent? The certainty of no conflict is the logical equivalent of the nonexistence of any separate private right.

The petitioners' own statements squeeze the life out of any possibility that they have a separate private right in this case. They cannot escape that consequence by claiming that these statements merely represent the usual rubric for justifying the certification of a class. An earlier class action in lieu of *Bedingfield* would certainly have had the same preclusive effect. Due process, however, does not require that only class actions are to be given preclusive effect in the litigation of purely public issues. *Sica v. City of Philadelphia*, 465 A.2d 91 (Pa. Cmwlth 1983). Where there is no possibility of a distinction between the public issue and a private right, the notice and opt-out features of a class action will have no significant due process value. Oversight by the court in a class action to assure adequacy of representation would have genuine value, but that concern can be addressed retroactively when a court evaluates whether a prior judgment should be given preclusive effect. In *Bedingfield*, the resources of the City of Birmingham and its active interest in thwarting a rival occupational tax assured an adequate and adversarial representation of the *Bedingfield* plaintiffs.

The federal courts in appropriate circumstances have also recognized that privity for purposes of preclusion can also be derived from an identity of interest with respect to a public issue uncontaminated by any cognizable private right. *Southwest Airlines Co. v. Texas Int'l Airlines*, 546 F.2d 84 (5th Cir.), cert. denied, 434 U.S. 832 (1977); *N.A.A.C.P. v. Hunt*, 891 F.2d 1555 (11th Cir. 1990).

As a conclusion to the *res judicata* issues in this case, it should be noted that there is no merit in the argument that Richards and Hill would have had no standing to challenge the Occupational Tax during the period that *Bedingfield* was litigated. *Eagerton v. Williams*, 433 So.2d 436 (Ala. 1983), does not support the position for which it is cited. Under Alabama law, a declaratory judgment to declare a tax invalid can be maintained by a targeted

taxpayer prior to the effective date of the tax. *Hunt v. Chemical Waste Management*, 584 So.2d 1367 (Ala. 1991), rev'd on other grounds, 504 U.S. 334 (1992).

II. The classifications made by the State of Alabama and by Jefferson County are well within the latitude enjoyed by state and local governments in matters involving taxation.

The County is also due to prevail on the merits of Richards' equal protection claim. A reviewing court may affirm the decision below on any proper ground, whether or not the ground was considered by the lower court. *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970). The absence of a factual record poses no legal or prudential barrier to this Court's resolution of the equal protection issues because "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *FCC v. Beach Communications, Inc.*, 113 S.Ct. 2096, 2102 (1993).

A. Legislative bodies enjoy wide latitude in making classifications for purposes of taxation, and the courts must accord extraordinary deference to such legislative classifications.

One hundred and six years ago, this Court laid down the bedrock principles that govern this case. *Bell's Gap R. Co. v. Pennsylvania*, 134 U.S. 232 (1890). There, the Court considered an equal protection attack on a statute that taxed some securities based on their actual value, but other securities based on their par value. Rebuffing that attack, the Court recognized the legislative power—and the broad discretion afforded legislative bodies in exercising that power—to create classifications for purposes of taxation:

> [The equal protection provision of the Fourteenth Amendment] was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all. . . . It may impose different specific taxes upon different trades and professions and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature. . . .

134 U.S. at 237. The Court has applied those principles consistently: *Kehrer v. Stewart*, 197 U.S. 60, 69 (1905) ("As we have frequently held, the state has the right to classify occupations, and to impose different taxes upon different occupations."); *Armour Packing Co. v. Lacy*, 200 U.S. 226, 235 (1906) (Equal protection does not prevent a state, "through the undoubted power of classification, [] impose different taxes upon different trades and professions."); *Southwestern Oil Co. v. State of Texas*, 217 U.S. 114, 121 (1910); ("In its discretion, [a state] may tax all, or it may tax one or some"); *State Board of Tax Commissioners v. Jackson*, 283 U.S. 527, 537 (1931) ("equal protection of the laws does not . . . prevent variety or differences in taxation, or discretion on the selection of subject, or the classification for taxation of properties, businesses, trades, callings, or occupations."); *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526 (1959) ("the State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products").

The broad, discretionary power of legislatures to make classifications applies in all areas of social and economic policy, but "in taxation, even more than in other fields,

legislatures possess the greatest freedom in classification." *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). This is true "particularly as respects occupation taxes." *New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573, 578 (1938) (emphasis added).

Complementing the broad latitude accorded the state in establishing taxation classifications is the very limited, very deferential, standard of judicial review. "[E]very presumption should be indulged in favor of the constitutionality of the legislation." *Bradley v. City of Richmond*, 227 U.S. 477, 485 (1913). The presumption must be honored "if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed." *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 357 (1916). "It is not the function of [the] Court in cases like the present to consider the propriety or justness of the tax, to seek for the motives, or to criticize the public policy which prompted the adoption of the legislation." *State Board of Tax Commissioners v. Jackson*, 283 U.S. 527, 537 (1931). Instead, as stated in *Madden v. Kentucky*, 309 U.S. 83, 88 (1940), "the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes."

The classifications that the Court has upheld in the face of equal protection challenges give substance to the foregoing principles. For example, the Court has upheld: a taxing scheme that differentiated between railroad property and the property of corporations chartered for different purposes, *Kentucky R. Tax Cases*, 115 U.S. 321 (1885); a law requiring a license fee for grain warehouses and elevators situated on railroad right-of-ways, but not for grain elevators and warehouses differently situated, *W.W. Cargill Co. v. Minnesota*, 180 U.S. 452 (1901); a law imposing a tax on the business of hiring persons to labor

outside the state but not on the business of hiring persons to labor within the state, *Williams v. Fears*, 179 U.S. 270 (1900); a business tax applicable to hand laundries but not to steam laundries, *Quong Wing v. Kirkendall*, 223 U.S. 59 (1912); a tax imposed on merchants offering coupons but not on other merchants, *Rast*, 240 U.S. 342; and a tax placed on anthracite coal that was not placed on bituminous coal, *Heisler v. Thomas Colliery Co.*, 260 U.S. 245 (1922). These examples justify the Court's observation in *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 509 (1937) (an equal protection challenge to Alabama's unemployment compensation tax) that it had "repeatedly held inequalities which result from a singling out of one particular class for taxation or exemption, [to] infringe no constitutional limitation".

The principles enunciated in *Bell's Gap* and its progeny remain vibrant today:

> Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, the statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.

FCC v. Beach Communications, Inc., 113 S.Ct. 2096, 2101 (1993). "[A]bsent a reason to infer antipathy . . . judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Nordlinger v. Hahn*, 112 S.Ct. 2326, 2336 (1992). Accordingly, a "statute is presumed constitutional and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support

it, whether or not the basis has a foundation on the record." *Heller v. Doe by Doe*, 113 S.Ct. 2637, 2643 (1993).

B. The decisions upon which the Petitioners rely turn on factors not present in this case.

Having failed to find a single favorable decision of this Court that is materially on point, the Petitioners have been forced to rely on case law that is inapposite because the outcomes were governed by considerations not present in this case. In each of those cases, for any of several reasons, the Court engaged in more sweeping scrutiny—albeit under what was stated to be a rational-basis test—than is appropriate in cases, such as this, involving local occupational tax legislation.

The equal protection clause does not exist in a vacuum; its protection against discrimination varies substantially in force and effect depending on the circumstances underlying the challenged discrimination, the nature of the benefit or burden that is the subject of discrimination, the manner in which the discrimination is created and applied, and the rationale underlying the discrimination. The existence of differing degrees of scrutiny under the equal protection clause—strict, intermediate, and rational-basis—confirms the Court's recognition that the rights protected are considered to be of varying importance. Strict and intermediate scrutiny have relatively limited application to certain suspect classifications or to fundamental rights of great importance in a free society. On the other hand, the degree of scrutiny applied under the rubric of "rational-basis" may vary discernibly according to the interests at stake and the nature of the classification. "[T]he standard of rationality as we have so often defined it must find some footing in the realities in the subject addressed by the legislation." *Heller*, 113 S. Ct. at 2643. Thus, the "rational-basis" inquiry will differ in scope—and result—according to the

context; rational reasons for classifications based on occupation may be considered irrational, or illegitimate, for classifications based on state of residence.

The concept of a fluid rational-basis standard is exemplified by the Court's decision in *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985), on which the Petitioners rely. *Ward* involved a challenge to Alabama's practice of levying a higher gross premiums tax on out-of-state insurance companies than that levied on domestic insurance companies. The trial court, affirmed by the Alabama Supreme Court, upheld the taxation scheme on the basis, inter alia, that the disparity of classification was intended to further the legitimate purpose of encouraging the formation of new insurance companies in Alabama. On review in this Court, a majority reversed and remanded the Alabama Supreme Court's decision. The Court held "that promotion of domestic business within a State," if accomplished by discriminating against foreign corporations, "is not a legitimate state purpose." 470 U.S. at 880. The Court reached that conclusion while at the same time agreeing "with the holding in *Allied Stores* [358 U.S. 528] that "a State's goal of bringing in new business is legitimate and often admirable." 470 U.S. at 879.

Despite the occasional disclaimer to the contrary, this Court's jurisprudence clearly recognizes and applies varying levels of rational-basis scrutiny—depending on the right implicated or the classification made. When the constitutionally-protected and fundamental "right to travel" is involved for example, the Court's "cases leave no doubt that it will trigger intensified equal protection scrutiny." *Zobel v. Williams*, 457 U.S. 55, 66 n.1 (1982) (Brennan, J., concurring). At the other end of this spectrum, there are local economic regulations. "When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particu-

lar statutory discriminations." *Zobel*, 457 U.S. at 81 (Rehnquist, J., dissenting).

Each of the cases upon which the Petitioners rely involved factors—either the nature of the classification made or the constitutional significance of the rights implicated—that required closer rational-basis scrutiny than would be applicable to run-of-the-mill occupational taxes such as the one involved here. Those cases do not represent an application of the rational-basis standard as limited as that which this Court has consistently applied in cases addressing social and economic matters implicating no constitutional interest or policy other than the equal protection clause—the right to be treated the same as others in the applicable class. As we have seen, the result in *Ward* was directly attributable to the discrimination against residents of other states, an abrogation of constitutional policy not alleged in this case.

The decision in *WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117 (1968), is equally inapposite, and for the same reason. In that case, the Court condemned, on equal protection grounds, a refusal to grant an out-of-state, nonprofit corporation a tax exemption automatically enjoyed by domestic nonprofit corporations. Again, although addressed under the rubric of rational-basis equal protection, the case turned on the different and less favorable treatment of the out-of-state, nonprofit corporation "solely because of [its] foreign incorporation." *Id.* at 120.

The Court's decisions in *Zobel v. Williams*, 457 U.S. 55 (1982), and *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985), are essentially comparable to each other. On the other hand, both are profoundly different from this case with respect to the constitutional rights at issue. *Zobel* and *Hooper* both involved state laws that discriminated between citizens of a state based on the longevity of their residence in derogation of the constitutional protection of national citizenship—a citizenship with fundamental rights that do not vary from state to state.

In *Zobel*, the Court sustained a constitutional challenge to the State of Alaska's decision to bestow certain benefits that increased in proportion to the length of residence in the state. The Court held that a purpose to favor established residents over new residents is a constitutionally unacceptable one. 457 U.S. at 65. A majority of the Court felt it desirable to remark further so as to provide a more comprehensive analysis to justify the result. Justice Brennan, concurring on behalf of himself and three other Justices, emphasized the pivotal role of the so-called "right to travel" that, although of less than certain origin, is well established as a fundamental, constitutionally protected right "that will trigger intensified equal protection scrutiny." 457 U.S. at 66 n.1. Also of importance to Justice Brennan's concurrence was the recognition that a scheme of classification based on length of residence would inevitably lead to the constitutionally impermissible conclusion that some citizens are more equal than others. Justice O'Connor, concurring separately, was equally adamant in recognizing the important and "fundamental" nature of the right to travel. "It is difficult to imagine a right more essential to the Nation as a whole than the right to establish residence in a new State." 457 U.S. at 76 (O'Connor, J. concurring).

The right to travel was also the foundation of the Court's analysis in *Hooper*, 472 U.S. 612. In that case, a New Mexico statute granted a $2,000 property tax exemption to Vietnam veterans who had resided in the State prior to a certain date but offered no exemption to Vietnam veterans who established residence after that date. Predictably, the statute was invalidated on the authority of *Zobel*. Again, the Court condemned the statute for its capacity to stigmatize late-comer veterans as "sec-

ond-class citizens." 472 U.S. at 623.[11] In any event, both *Hooper* and *Zobel* reflect the higher level of rational-basis scrutiny that will be employed when fundamental constitutional rights—above and beyond those granted by the equal protection clause—are adversely affected by a state's classification decision.

City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1983), presents a somewhat different situation. In *Cleburne*, the Court, while purporting to apply rational-basis scrutiny, looked very closely at the extent and nature of the discriminatory classification and the putative justifications for it. *Cleburne* involved a challenge to a municipal zoning ordinance that permitted, without restriction, such uses as apartment houses, boarding and lodging houses, fraternity and sorority houses and dormitories, apartment hotels, hospitals, sanitariums, nursing homes or homes for convalescents or aged, private clubs, fraternal orders, and accessory uses customarily incident to any of the above listed uses. 473 U.S. at 436 n. 3. In contrast, the following uses were permitted only by acquisition of a special permit: hospitals for the insane or feebleminded, or alcoholics, or drug addicts, or penal or correctional institutions. Cleburne Living Centers ("CLC") intended to operate a planned group home for the mentally retarded. The City classified the home as requiring a permit on the basis that it should be considered a hospital for the "feebleminded." The City then refused to issue the necessary permit. The Court, per White, J., concluded that rational-basis scrutiny was appropriate but then proceeded to review very closely the City's stated purposes in requiring a license in the first place and then denying the home's application for one. Showing little of

[11]One also senses in the Court's analysis an underlying discomfort with the notion that veterans who had fought for the nation could thereafter be classified for purpose of benefits according to their state of residence. 472 U.S. at 623.

the deference ordinarily required under a rational-basis review, the Court made short shrift of the City's stated purposes and concluded that "this case appears to us to rest on an irrational prejudice against the mentally retarded." 473 U.S. at 450. Justice Stevens, for himself and the Chief Justice, concurred, saying that he was convinced from the record that the permit requirement resulted from "the irrational fears of neighboring property owners," a constitutionally insufficient reason. 473 U.S. at 455. Three Justices, in partial concurrence and partial dissent, opined (and not without reason) that the plurality had invalidated the City's ordinance "after subjecting it" to precisely the sort of probing inquiry associated with heightened scrutiny. At bottom, the degree of scrutiny actually employed, and by whatever name fairly described, was going to be sufficient to remedy the transparent discrimination of the City against mentally retarded people. Consequently, such a decision holds very little persuasive value with regard to applying an appropriate standard of review and has no relevance to this case, which involves local taxing classifications only.

The last case on which the Petitioners place any appreciable reliance is this Court's decision in *Allegheny Pittsburgh Coal Co. v. County Commission*, 488 U.S. 336 (1989). The tax assessor of Webster County, West Virginia, relied on most recent sales prices for tax purposes. The result was wildly disparate valuations of comparable properties. In striking down the practice, the Court did not decide the legitimacy of a transaction-price based assessment method because the state of West Virginia had never adopted such an assessment procedure. To the contrary, the Constitution of West Virginia guaranteed equal and uniform taxation throughout the state on both real and personal property, which was to be taxed in proportion to its value. The Webster County tax assessor was following his own "aberrational enforcement policy." 488 U.S.

at 344. Consequently, the Court's reasoning is not likely to be useful in cases where the state law has been followed on its terms, especially after the decision in *Nordlinger*, 112 S. Ct. 2326.

C. The classification determining the natural persons who would be subject to the Occupational Tax does not violate equal protection.

The equal protection claims in this case appear to be based only on assertions that the Occupational Tax and its exemptions are "cockamamie." At bottom, this claim seems to be nothing more than a bald assertion that Richards ought not to be required to pay occupational tax if anyone else is exempt therefrom. This Court resolved that issue over a hundred years ago in *Bell's Gap*.

This Court has repeatedly held that only "clear and hostile discriminations against particular persons and classes" are forbidden by the equal protection clause. *E.g., Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 255 (1922); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973). The equal protection clause forbids only distinctions or discriminations that are "palpably arbitrary" or "insidious." The County enjoys a presumption of constitutionality that "can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes." *Madden*, 309 U.S. at 88.

Because Richards has failed to suggest that any actionable disparity between similarly situated people results from the County's classification, the equal protection analysis need go no further. However, there are plausible reasons for the configuration of the Occupational Tax.

As explained in the Statement, the County's taxing authority is derived from Act No. 406 of the Alabama Legislature. The most fundamental reason for the classifications is that the Legislature, acting well within its discre-

tion, concluded that the natural candidates for county business and occupation taxes were businesses and natural persons not already subject to an occupation or business tax assessed by the state or the County. The broad group of employees that the County could ultimately tax already existed as a classification—the class of employees then exempted from existing state and county taxes. Under those circumstances, a more logical and reasonable classification can scarcely be conceived. The Court, in fact, has on several occasions noted with approval that a challenged classification was predicated on a classification already in existence. A "[v]alid reason" for an excise tax statute establishing two classifications of utilities for tax purposes "appears from the fact that the [challenged] laws merely adopted the classification previously established" under New York law. *New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573, 580 (1938). To like effect is *FCC v. Beach Communications*, 113 S.Ct. at 2103 ("Congress borrowed [the challenged classification] from pre-Cable Act regulations, and although the existence of a prior administrative scheme is certainly not necessary to the rationality of the statute, it is plausible that Congress also adopted the FCC's earlier rationale.").

The Court addressed circumstances quite like those of the County in *Caskey Baking Co. v. Virginia*, 313 U.S. 117 (1941). In that case, the Court quickly disposed of a claim much like that made here by Richards. The tax at issue was "but one portion of a comprehensive scheme of taxation." 313 U.S. at 120. The Court also noted that the complainants, but for the new tax they were challenging, would be the only vendors in the state to escape some form of taxation. *Id.* at 120-121. Here, as there, it is perfectly rational to impose a tax on only those natural persons previously exempted from all occupational license taxes.

The County has explained in detail above the manner in which the Alabama business and professional license tax code—upon which the Legislature predicated Act No. 406 in 1967—came into existence in response to specific financial and other needs. One might question the wisdom of designing a tax scheme like that developed in Alabama over a period of almost 70 years, but: there is no basis upon which to find it unconstitutional, either as it is configured now or as it was developing in the past.

As discussed in the Statement, the only sizable class of natural persons who are not subject to the Occupational Tax comprise the state-regulated professions, of which the learned professions have the greatest economic significance. There are several readily conceivable, logical bases on which to treat the learned professions as a distinct class for purposes of taxation. First, professions are regulated by the State of Alabama. The opportunity to tax necessarily carries with it the opportunity to bury the taxpayers in forms and regulations. The Alabama legislature could have quite reasonably concluded that it did not want any interference from the County in regulating the professions. Another justification for the exclusion of professionals from a local occupational tax is to avoid giving those professionals a reason to disperse to other counties. The State has a conceivable and legitimate interest in insuring that the professional people in its largest metropolitan area stay in they area so as to continue to provide civic leadership and interact for the benefit of the area.

With respect to Hill individually, she presumably contends that her position as a custodial worker in a commercial setting is comparable to the position of a domestic servant working in a private home. A reasonable basis for the exemption of domestic servants working in private homes is that the administration and expense involved in collecting and accounting for the tax would

likely exceed the tax collected. The Court has recognized administrative expense and convenience as a legitimate purpose for classification on several occasions. *Carmichael*, 301 U.S. at 511.

Yet another reason for the exemption of domestic servants working in private homes would be to accommodate the citizens of the County. The average individual in a private home who would hire a domestic servant is not typically going to be a person who can simply add one more form to the computer program. Certainly the County can take into account the obvious differences between businesses accustomed to keeping employment records and to withholding taxes, versus homemakers who are not.

CONCLUSION

The judgment of the Alabama Supreme Court is correct in its result and should be affirmed with such modifications as this Court deems appropriate. An expeditious and definitive resolution of the equal protection issues concerning the validity of the Occupational Tax is of vital importance to the County. Therefore, regardless of this Court's disposition of the judgment of the Alabama Supreme Court, the Respondents respectfully request that this Court decide the federal equal protection question of which it has taken jurisdiction and render judgment upholding the constitutional validity of the Occupational Tax.

Respectfully submitted,

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1995

JASON RICHARDS and FANNIE HILL,
Petitioners,

vs.

JEFFERSON COUNTY, ALABAMA
and BIRMINGHAM-JEFFERSON CIVIC
CENTER AUTHORITY,
Respondents.

On Writ Of Certiorari To The Supreme Court Of Alabama

APPENDIX TO BRIEF OF RESPONDENTS

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CODE OF ALABAMA 1975

TITLE 40
REVENUE AND TAXATION

CHAPTER 12
LICENSES

ARTICLE 1
GENERAL PROVISIONS

§ 40-12-1. Change of place of business.

When a person has obtained a license to engage in or carry on any business, employment, or profession at any definite place in a county or city in Alabama and desires to remove to any other place within the same county or city where the license was granted and wishes his license altered accordingly, the probate judge who originally issued such license shall make such alteration, which alteration shall be shown on the license records of the probate judge's office; provided, that no license shall be altered to change a place of business to a location requiring a higher license than originally paid. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 830.)

§ 40-12-2. Issuance; form of license; levy of county tax; actions for recovery of tax.

(a) Before any person, firm or corporation shall engage in or carry on any business or do any act for which a license bylaw is required, he, they or it, except as otherwise provided, shall pay to the judge of probate of the county in which it is proposed to engage in or carry on such business or do such act, or to the commissioner of licenses or the State Department of Revenue, as specified, the amount required for such license and shall comply with all the other requirements of this title.

(b) Upon the payment of the amount required for said license and a fee of $1 herein provided for the issuance of such license and all costs and fees and penalties which shall have accrued, or for which such person, firm or corporation shall have become liable in any proceedings commenced for the collection of such license, or to enforce payment thereof, such probate judge, commissioner of licenses or Department of Revenue shall issue the license properly countersigned, in the form and on the blank to be furnished by the comptroller, which shall set forth and specify the name of the person, firm or corporation applying therefor, whether the business, profession or occupation for which the license is procured is owned by an individual, partnership, corporation or other association, stating the name of the individual, the name of each of the partners if a partnership, the exact name of the corporation or association, if a corporation or association, and the name of each of the principal officers thereof, the business or act which it is proposed to carry on or do thereunder, the name of the street or location where it is proposed to carry on the same, if such location shall be in a city or town and have a street number and, if not, then the location and amount paid for such license, and the time for which it is issued; and if the license is for a peddler it shall state whether he proposes to travel on foot or on horseback or on wagon or motor vehicle; provided, that the governing body of any county may furnish application blanks in such form that the applicant for a license may supply the above information in writing; and such license shall not be transferable except as otherwise provided herein, nor shall it entitle the holder thereof to carry on any other business or do any other act than that named therein.

(c) Whenever a license is levied in this title, there shall be collected both a state and county license for each

place of business, except as specifically otherwise provided.

(d) In case it should become necessary to remove any business for which a license is required by this section from one location to another location in the same county, and such business is continued as the same kind and character and by the same person or firm as that carried on at the former location, another license shall not be required for such business for the same license year.

(e) There is hereby levied for the use and benefit of and to be paid to the county in which the license is issued, in addition to all license taxes levied under the provisions of Article 2 of this chapter, for state purposes and which are payable to the judge of probate or commissioner of licenses, a sum equal to 50 percent of the amount levied for state purposes, except as otherwise specifically provided.

(f) Any action to recover the amount due for any license, whether levied solely for state purposes or for state and county purposes, shall be instituted by the State of Alabama and may include all penalties and fees due by any person, in addition to the amount due for such license and interest thereon. The amount recovered in any such actions shall be paid to the State Department of Revenue, and if any portion of said license was levied for county purposes, such portion shall be remitted to the county in which such license was payable, and the department may from the amount of any penalties or fee thus recovered remit the amount, if any, due to the judge of probate, commissioner of licenses or license inspector. (Acts 1935, No. 194, p. 256; Acts 1939, No. 18, p. 16; Code 1940, T. 51, § 831; Acts 1943, No. 546, p. 535; Acts 1951, No. 700, p. 1208; Acts 1984, No. 84-446, p. 1040, § 7.)

§ 40-12-3. Collection and distribution where both state and county license tax levied.

Whenever, by virtue of the provisions of subsection (d) of Section 40-12-2, or the provisions of Article 2 of this chapter, both a state and county license tax are levied, the authority charged with the duty of collecting such license tax shall continue to collect the same, and of the total amount collected for such state and county license tax he shall distribute one half thereof to the state and one half thereof to the county, any other provision of law to the contrary notwithstanding. (Acts 1955, No. 572, p. 1248.)

* * *

§ 40-12-8. False affidavits or certificates.

Any person who shall knowingly make any false affidavit or certificate in connection with the ordering or procuring of a license to carry on any business or do anything in this state for which a license is required shall be guilty of a misdemeanor and, upon conviction, when the offense is not otherwise specifically provided for, shall be fined not less than $100 nor more than $1,000 and, at the discretion of the court, may be sentenced to hard labor for the county not to exceed six months as additional punishment. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 833.)

§ 40-12-9. Penalty for failure to take out license; selling throughout state under one license.

(a) It shall be unlawful for any person, firm or corporation to engage in or carry on any business, or do any act for which a license is required now or may hereafter be by law, without having first paid for and taken out a license therefor in the manner in this title provided. Any person who is convicted of failing to take out and pay for

the license required shall be fined not less than the amounts of all licenses required of him and, if convicted for refusing to take out the license shall, on conviction, be fined not less than the amount of the state and county license due by him and not more than $100 in addition thereto, and may be sentenced to hard labor for the county for not more than six months, all fines to be paid in money; and, when collected, two thirds shall be paid to the state and one third to the county.

(b) No person shall be allowed the privilege of selling throughout the state under one license except by special provisions of law. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 834.)

§ 40-12-10. License inspectors generally; when taxes due and payable; collection of delinquent taxes.

(a) The county commission of each county is hereby authorized and empowered to appoint a license inspector.

(b) It shall be the duty of the license inspector to scrutinize the records and stubs kept in the office of the probate judge and also to examine the license records of each city or town located in the county or counties of which he has been appointed license inspector; and, if it shall be reported to any license inspector or come to his knowledge that any person, persons, firms or corporations have failed or refused to take out a license for a business or occupation for which a license is required by the state or have failed or refused to take out a license for operating any motor vehicle or trailer for which a license is required by law, the license inspector shall thereupon cite such delinquent to appear before the license inspector at the courthouse of the county in which such citation is issued and to show cause why the license or privilege tax required by law has not been paid and, at

the same time, shall file with the probate judge of the county a copy of such citation showing service on the delinquent.

(c) If the license inspector shall discover any motor vehicle being operated without a proper or legal license, he shall cite the operator of the motor vehicle; and, in filing copy of such citation with the probate judge, he shall show on such citation the particular motor vehicle operated without legal license, as well as the operator thereof.

(d) The probate judge must in all cases, in addition to the other penalties required to be collected by him, collect the citation fee, if any, before issuing any license; and, in case of a motor vehicle where a license is taken out in the name of person not cited, the citation fee shall be collected if the citation filed shows the motor number of such vehicle. When any license is due the license inspector shall cause the delinquent to appear before the probate judge of the county and take out the same, but such probate judge shall not have the authority to determine the liability of such delinquent for such license and shall in each case issue a license to the applicant upon the payment by him of the amount or amounts prescribed by this title. If such delinquent shall fail or refuse to take out a license, the license inspector shall institute or cause to be instituted criminal proceedings against such delinquent before any court having jurisdiction of such offense. In case of emergency the license inspector must commence the criminal proceedings in the first place.

(e) All license taxes levied by this title, except as otherwise provided, shall be due and payable as of October 1 of each year and shall be delinquent November 1 thereafter. Where any license issuable by the probate judge or commissioner of licenses shall be delinquent, the same shall be subject to a penalty of 15 percent of the amount

of the license, which penalty must be collected by the probate judge or commissioner of licenses when the license is taken out together with interest at six percent from the date of delinquency; provided, that the penalty for delinquency in payment of motor vehicle licenses shall in no case be less than $1.50.

(f) It shall be unlawful for any probate judge or other officer to fail to collect such penalties when issuing such license.

(g) The probate judge, in remitting such penalties, shall file report with the county commission, comptroller and with the Department of Revenue showing the amount of such penalties collected, from whom, and for what collected, and he shall remit to the county general fund all penalties collected. The probate judge shall remit to the county general fund all citation fees collected where the citation was served by the license inspector or his deputy.

(h) If a criminal prosecution shall be commenced either by affidavit and warrant, or information or indictment, 44 percent of the fine or penalty thereafter imposed in the case shall be paid to the county general fund. The remainder shall be paid to the treasury of the state.

(i) The county commission may appoint deputy license inspectors, and the acts of such deputies shall be recognized as the acts of the license inspector.

(j) All citations to delinquents shall be served by any lawful officer or by the license inspector or his deputy for which a fee of $1.50 for each citation served shall be taxed against the delinquent.

(k) License inspectors shall have the same power to arrest persons violating the revenue laws of the state as is now vested in the sheriffs of the state and shall receive the same fees for such service.

(l) The Department of Revenue shall keep a record by counties in which, each month, shall be entered the number of licenses issued by the probate judge for each and every business or occupation for which a state license tax is required, and such record may be compared each month with the number of licenses issued by cities and towns for the same business or occupation.

(m) The license inspector shall be required to report to the Department of Revenue the reason for the failure to collect any licenses due the state which may be evidenced by the comparison of the report of the probate judge and the report made of licenses issued by cities or towns.

(n) It shall be the duty of the county commissions of the several counties to supply the license inspector with necessary citation blanks and other necessary forms to be paid for by the county.

(o) The county commission shall fix and pay the salary of the license inspector and his deputies and the expenses of his office.

(p) The provisions of this section shall not repeal, modify or prohibit any presently existing or future local act or general act of local application affecting the office of license inspector or which establishes any office or position which encompasses the duties of license inspector in any county. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 835; Acts 1951, No. 610, p. 1053; Acts 1990, No. 90-558, p. 948.)

§ 40-12-11. Bonds of license inspectors.

Before entering upon the duties of their office, all license inspectors shall execute to the State of Alabama a bond, to be approved by the Governor, in amounts to be fixed by the Department of Revenue, for the faithful performance of their duties. (Acts 1943, No. 122, p. 123; Acts 1961, Ex. Sess., No. 208, p. 2190.)

§ 40-12-12. License to designate place of business.

Every license granting authority to engage in or exercise any business, employment or profession, unless expressly authorized elsewhere or otherwise, shall designate the place of such business, employment or profession at some specified house or other definite place within the county of the probate judge granting it. Engaging in or exercising any such license, business, employment or profession elsewhere than at such house or definite place, unless expressly authorized elsewhere or otherwise by law, shall be held to be without license. A license which does not specify such house or definite place where business, employment or profession is limited thereto by law shall be void. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 836.)

§ 40-12-13. Engaging in several businesses.

Where any person, firm or corporation is engaged in more than one business which is made by the provisions of law subject to taxation, such incorporated company or person shall pay the tax provided by law on each branch of the business. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 838.)

§ 40-12-14. Two or more licenses on same business.

Wherever in this title two or more licenses on the same business or occupation are required, it is hereby declared to be the intention of the legislature that all such licenses as are herein levied shall be collected without credit or offset, except where specific provision is made therefor. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 839.)

§ 40-12-15. License deemed a personal privilege; transferability.

(a) Every license shall be held to confer a personal privilege to transact the business, employment or profession which may be the subject of the license and shall not be exercised except by the person, firm or corporation licensed, unless specifically authorized by law to do so.

(b) When a business or privilege for which such license is issued is, under actual sale, transferred to a new ownership, a transfer of license may be effected by application to the probate judge originally issuing such license and the payment of a fee of $1. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 840; Acts 1984, No. 84-446, p. 1040, § 7.)

§ 40-12-16. Sworn statements of amount of capital, value of goods, stock, etc.

In all cases where the amount to be paid for a license depends upon the amount of capital invested, the value of the goods or stock, the amount of sales or receipts or any other fact or condition hereinbefore recited, it shall be the duty of the person applying for such license to render to the probate judge a sworn statement of the amount of the capital invested, of the value of the goods or stock or amount of sales or receipts, and to make under oath such further proof or affidavit as may be required by the probate judge to determine the character of the license and the amount to be paid for the same. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 841.)

§ 40-12-17. Population of municipality as determining tax.

Whenever this title fixes a license for a business or occupation which is located without the corporate limits of an incorporated municipality but within a fixed distance of such municipality and fixes the amount of the license by the population of such municipality, in the event there is more than one municipality within such distance of the location of such business, then the amount of the license shall be that which is provided for by the nearest municipality. (Acts 1935, No. 194, p. 256; Acts 1936, Ex. Sess., No. 124, p. 82; Code 1940, T. 51, § 842.)

§ 40-12-18. Penalty on agents of persons, firms, etc., who have not paid tax.

Any person who acts as agent for any person, firm or corporation liable for the payment of a license or privilege tax, without said license or privilege tax having been paid, shall on conviction be fined in a sum equal to the state and county license, and not more than $100 in addition thereto, and may also be sentenced to hard labor for the county for not more than six months. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 843.)

§ 40-12-19. Duty of Department of Finance to prepare forms of licenses.

It shall be the duty of the Department of Finance to prepare and have printed suitable forms of licenses and as often as need be to furnish to the several probate judges blank licenses signed by the director sufficient for the probable wants of their respective counties, taking their receipts for the same. Each such blank shall have a stub attached thereto, on which shall be printed such matter as the Department of Finance may prescribe, with appropriate blank spaces to be filled in by the probate judge upon the issuance of any license. The Department of Finance shall take and file in the director's office a proper receipt from the probate judge for the blank licenses furnished him. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 844.)

§ 40-12-20. License and stub must correspond.

Upon the issuance of any license the probate judge must, before detaching the license from the stub, fill up the blank spaces in the stub to correspond in all respects with the license as issued and sign his name thereto. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 845.)

§ 40-12-21. Records to be kept by probate judge.

The probate judge shall keep in a book prepared for that purpose an accurate account of all licenses received by him from the Department of Finance, and of the disposition made of them, and of all money received from the licenses issued by him, and make report thereof to the Department of Finance within 10 days after the expiration of the fiscal year, at which time he shall return to the Department of Finance all unused licenses and stubs, or account to the Department of Finance for all unused licenses, and shall also return to the Department of Finance the stubs of all licenses issued by him, and the probate judge shall on demand of the Department of Finance, at any time, exhibit to him or to any agent appointed by the Department of Finance for that purpose such license record and the original of all licenses then remaining in his hands and all stubs of licenses issued. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 846.)

§ 40-12-22. Disposition of moneys by probate judge.

Within 20 days after the end of each month, the probate judge must remit to the State Treasurer at the expense of the state all money received by him for licenses belonging to the state and pay to the county treasurer all the money received by him for licenses belonging to the county, and within the same time the probate judge shall forward to the comptroller and to the Department of Revenue each certified list of all licenses issued by him,

stating thereon for what business issued, amount collected for each license, from whom collected and the date of such collection; and, if no licenses have been issued, he shall report that fact; provided, that for the months of October, November and December of each calendar year, the probate judge shall be granted an additional period of 10 days in which to make the remittances and certification of lists above specified and for such months shall be required to make such remittances and certification of lists within 30 days after the end of each of such months. The probate judge shall be entitled to receive five percent of the amount of money collected for licenses due the state, which he may deduct from his remittance to the State Treasurer, and he shall be entitled to the same amount as compensation for collecting licenses due the county, which amount he may deduct from the payment made by him to the county treasurer, but he shall not be allowed any commission on any money not remitted by him within 20 days from the end of the month, except as otherwise provided herein with reference to the months of October, November and December of each calendar year, for which months the probate judge shall be entitled to the commissions herein provided if such remittances be made within 30 days after the end of each such months. If the probate judge fails to comply with the provisions of this section within five days after the date on which he is required to make such report and to remit the money collected by him, the comptroller shall forthwith report the fact to the Governor, who shall cite such probate judge to show why he has not made report of the lists of licenses and paid over the amount collected by him as required by law, and if such probate judge fails to show sufficient cause for such failure, the Governor shall direct the Attorney General to institute impeachment proceedings against him before the supreme court. (Acts 1935, No. 194, p. 256; Code

1940, T. 51, § 847; Acts 1951, No. 854, p. 1483; Acts 1977, No. 165, p. 224; Acts 1984, No. 84-446, p. 1040, § 7.)

§ 40-12-23. Applications for refunds; additional license.

(a) Any person who by a mistake of fact or law has paid to the probate judge or the commissioner of licenses money that was not due from him for a license or an amount in excess of that required by law for the business or occupation to be carried on by such person under the license shall be entitled to have refunded the money incorrectly paid, less the issuance fee and commission retained by the judge of probate or the commissioner of licenses.

(b) Any petition for refund pursuant to subsection (a) shall be filed directly with the department within the time allowed for refunds in Chapter 2A of this title, and thereafter shall be administered as provided for other refunds in Chapter 2A of this title.

(c) In case of the issuance of a license for less than the amount due therefor, upon the payment of the additional amount due for such license an additional license may be issued, in such manner as to allow credit for the amount previously paid by the licensee, and there shall be endorsed on the face of such additional license the words "Additional To License No. _____." (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 848; Acts 1943, No. 544, p. 533; Acts 1992, No. 92-186, § 23.)

§ 40-12-24. Department of Revenue to certify refund; State Comptroller and county commission to draw warrants payable to applicant.

If the petition for refund allowed by Section 40-12-23 is approved, in whole or in part, the department shall certify the amount which it approves to be refunded by the state and county. The State Comptroller shall draw a warrant payable to the applicant for the amount of the refund to be made by the state, and the county commission of the county in which such payment was made shall draw a warrant upon the county treasurer or county treasury payable to the applicant for the amount to be refunded by such county. Claims for refund hereunder shall not be subject to assignment, except assignments resulting by operation of law. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 849; Acts 1943, No. 544, p. 533; Acts 1992, No. 92-186, § 24.)

§ 40-12-25. License for part of year.

Unless otherwise provided, if any business licensed by this title shall commence after April 1 in any year, the amount of the license or privilege tax shall be one half of the year's license or privilege tax. In all other cases the license shall be taken out for the full term of one year, unless a shorter term is fixed by the provisions of this title. In all cases where the amount of license is rated according to the population of the town, city or county, the population of such town, city or county as fixed by the last preceding United States census shall govern. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 850.)

§ 40-12-26. Due and delinquent date; term of license.

Except as otherwise provided, all licenses or privilege licenses payable hereunder shall be due on October 1 of each year and shall be for one year, ending September 30 following, and shall be delinquent on November 1 of each year. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 851.)

§ 40-12-27. Each day's violation a separate offense.

If the law annexes a penalty for each or every violation of its provisions, or for each separate offense, it shall be

lawful to hold that each day's continuance in the exercise of any business, employment or profession, for which a license is required, constitutes a separate offense. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 837.)

§ 40-12-28. Disposition of proceeds of funds from licenses pertaining to timber or timber products.

All occupation license or privilege taxes imposed by the state for engaging in any business dealing with timber or timber products shall be paid into the conservation fund of the Department of Conservation and Natural Resources. (Acts 1935, No. 500, p. 1078; Code 1940, T. 51, § 911.)

§ 40-12-29. Additional penalty for failure to comply with Articles 8 and 9 of this chapter.

In addition to the criminal penalty provided by Sections 40-12-400 and 40-12-424, any person who willfully fails to comply with the provisions of Article 8 and Article 9 of this chapter shall for each such failure be subject to a penalty of not less than $500 nor more than $1,000. (Acts 1991, No. 91-321, p. 595, § 2.)

§ 40-12-30. Department of Revenue authorized to promulgate rules and regulations.

The Department of Revenue is hereby authorized to promulgate reasonable rules and regulations relating to the administration and enforcement of the provisions of this act and those other provisions of this chapter relating to the licensing of automobile and other motor vehicle dealers not in conflict with the specific provisions hereof. (Acts 1991, No. 91-321, p. 595, § 3.)

CODE OF ALABAMA 1975

TITLE 40
REVENUE AND TAXATION

CHAPTER 12
LICENSES

ARTICLE 2
BUSINESS, VOCATION OR OCCUPATION

§ 40-12-40. Who must procure state and county licenses.

Every person, firm, company, corporation or association, receiver or trustee, but not a governmental subdivision, engaged in any business, vocation, occupation, calling or profession herein enumerated or who shall exercise any privilege hereinafter described for which a license or privilege tax is required shall first procure a state license, and a county license when so required, and shall pay for the same or shall pay for the exercise of such privilege the amounts hereinafter provided, and comply with all other provisions of this title. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 450.)

§ 40-12-41. Abstract companies, etc.

Abstract companies and persons engaged in the business of furnishing abstracts of title shall pay the following license taxes: in towns or cities of 100,000 inhabitants or more, $75; in towns or cities of 50,000 inhabitants and less than 100,000 inhabitants, $50; in towns or cities of 20,000 inhabitants and less than 50,000 inhabitants, $40; in towns or cities of 10,000 inhabitants and less than 20,000 inhabitants, $25; in towns and cities of 5,000 inhabitants and less than 10,000 inhabitants, $20; and in all other places, whether incorporated or not, $10. The payment of the license tax required by this section shall au-

thorize the doing of business only in the town, city or county where paid; provided, that this section shall not apply to regular licensed practicing attorneys who furnish abstracts as a part of their general practice. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 451.)

§ 40-12-42. Acetylene gas and carbide manufacturers.

Each person manufacturing acetylene gas and carbide shall pay the following license tax: in towns of over 25,000 inhabitants or within five miles thereof, $50; all other places, whether incorporated or not, $25. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 452.)

§ 40-12-43. Actuaries, auditors and public accountants.

Each professional actuary, auditor or public accountant shall pay a license tax of $25 to the state, but no license tax shall be paid to the county. If such business is conducted as a firm or as a corporation in which more than one person above named is engaged, each person so engaged shall pay a license tax of $25. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 453.)

§ 40-12-44. Adding machines, calculating machines, comptometers, etc.

Each person engaged in the business of selling adding machines, calculating machines, comptometers, billing machines, bookkeeping machines, cash registers, typewriters or similar machines shall pay the following annual privilege tax: in counties of over 100,000 inhabitants, $100; in counties of over 60,000 inhabitants and not over 100,000 inhabitants, $60; in counties of over 40,000 inhabitants and not over 60,000 inhabitants, $40; in counties of 40,000 inhabitants or less, $25. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 454.)

§ 40-12-45. Advertising.

All bill posting and advertising companies displaying advertisements in public places, including streetcars, and each person engaged in the business of advertising or bill posting shall pay the following license taxes: in counties having 200,000 inhabitants or over, $150; in counties of less than 200,000 inhabitants and as many as 100,000 inhabitants, $125; in counties of less than 100,000 inhabitants and as many as 75,000 inhabitants, $100; in counties of less than 75,000 inhabitants and as many as 50,000 inhabitants, $50; in counties of less than 50,000 inhabitants and as many as 30,000 inhabitants, $25; in counties of less than 30,000 inhabitants, $15. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 456.)

§ 40-12-46. Air-conditioning plants and equipment.

Each person engaged in the business of selling or installing air-conditioning plants or equipment which use or require the use of water connections shall pay, in the county in which is located his principal office, an annual state privilege tax of $100 and a county privilege tax of $50; provided, that in each other county in which such person engages in the business of selling or installing such air-conditioning plants or equipment, he shall pay a state license tax of $10 and a county license tax of $5; provided further, that no person subject to the provisions of this section shall be required to pay the license tax levied hereunder in any county other than where he maintains a regular and established place of business for the purpose of selling or installing such air-conditioning plants or equipment.

Any person other than those persons licensed under paragraph one hereof engaged in the business of selling or installing air-conditioning plants or equipment which do not use or require the use of water connections shall

pay an annual state privilege license tax for each place of business as follows: in cities of 100,000 inhabitants or more, $30; in cities of 50,000 and less than 100,000 inhabitants, $20; in cities of 10,000 and less than 50,000 inhabitants, $10; in places of less than 10,000 inhabitants, whether incorporated or not, $5.

As used in this section the term "air-conditioning" means the artificial lowering or raising of temperature or the supplying of fresh air by artificial methods.

Upon the payment of the license prescribed by Section 40-12-84, a contractor who installs air-conditioning plants or equipment shall not be required to pay the license prescribed by this section, nor shall any person who has paid the license prescribed by this section, who accepts contracts only for the installation of air-conditioning plants and equipment and no other type of construction work be required to pay the license prescribed by Section 40-12-84. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 457; Acts 1951, No. 582, p. 1017; Acts 1955, 2nd Ex. Sess., No. 71, p. 184.)

§ 40-12-47. Amusement parks.

Owners and operators of permanent amusement parks which shall be open for the public for not more than five months of each year may be exempted from payment of the license or privilege taxes on amusements or entertainments licensed by this title; provided, that they take out and pay for a license to operate a permanent amusement park at the following rates: in cities or towns of less than 5,000 inhabitants, or within five miles thereof, $25; in cities or towns of 5,000 inhabitants and less than 15,000 inhabitants, or within five miles thereof, $50; in cities of 15,000 and less than 25,000 inhabitants, or within five miles thereof, $100; in cities of 25,000 or more inhabitants, or within five miles thereof, $200. The provision of this title permitting the payment of a half-

year license after April 1 shall not apply to this section. No license shall be paid under this section by any town or city which itself owns and operates an amusement park. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 458.)

§ 40-12-48. Architects.

Each architect practicing his profession for the public shall pay to the state a license tax of $25, but no license shall be paid to the county. If such business is conducted as a firm or as a corporation in which more than one person above named is engaged, each person so engaged shall pay the amount provided above. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 459.)

§ 40-12-49. Attorneys.

(a) Each attorney engaged in the practice of law shall pay an annual license tax to the state, but none to the county. On October 1, 1992, the license tax shall be $200, and on October 1, 1993, and each year thereafter, the annual license tax shall be $250. If business is conducted as a firm or as a corporation in which more than one lawyer is engaged, each lawyer shall pay such license tax, but no lawyer shall be required to pay a license tax until the first day of October following admission to the bar. The license tax shall be paid to the Secretary of the Board of Bar Commissioners of the Alabama State Bar. The funds collected for the issuance of the license tax levied shall constitute a separate fund to be disbursed on the order of the Board of Commissioners of the Alabama State Bar. As soon after the first day of each November as practicable, the Secretary of the Alabama State Bar shall certify to the presiding judge of the circuit court having jurisdiction in the county the names of attorneys who have paid the license fee.

(b) The license taxes shall be due and payable on October 1 of each year and shall be delinquent on the following November 1. If a license is delinquent, the Secretary of the Board of Bar Commissioners of the Alabama State Bar shall assess and collect a penalty of 15 percent of the amount of the license. The penalty shall be paid when the license is issued.

(c) Section 40-12-10, relating to the collection and distribution of business license taxes shall not be applicable to license taxes provided in subsection (a). (Acts 1935, No. 194, p. 256; Acts 1939, No. 551, p. 871; Code 1940, T. 51, § 460; Acts 1951, No. 186, p. 437; Acts 1959, No. 156, p. 682; Acts 1966, Ex. Sess., No. 287, p. 430; Acts 1971, No. 958, p. 1716; Acts 1979, Ex. Sess., No. 79-27, p. 37; Acts 1985, 1st Ex. Sess., No. 85-119; Acts 1992, No. 92-600, p. 1246, § 1.)

§ 40-12-50. Auctioneers.

Auctioneers and apprentice auctioneers shall pay annual license taxes in accordance with Chapter 4 of Title 34.

§ 40-12-51. Automobile dealers.

Each person dealing in, selling or purchasing for resale automobiles, trucks or other self-propelled vehicles shall pay an annual state license as provided in this section and shall pay a county license tax of one half the amount of his state license tax for the use of the counties. The following license taxes shall be paid by each dealer, each agent or other person, except agents of a dealer who have procured the licenses required in the following section: in cities and towns of 50,000 or more inhabitants, $140; in cities and towns of over 25,000 and not exceeding 50,000 inhabitants, $100; in cities and towns of over 10,000 and not exceeding 25,000 inhabitants, $80; in cities and towns of over 5,000 and not exceeding 10,000 inhabitants, $65; in cities and towns of over 2,500 and not exceeding 5,000 inhabitants, $50; in cities and towns of 2,500 and less inhabitants, $30; in all other places, whether incorporated or not, $30; provided, that a person maintaining more than one place of business in the same city or town for the sale of automobiles, trucks or other self-propelled vehicles shall pay an additional license tax of one half of the license tax levied on his principal place of business for each additional place of business; provided, that the licensed dealer may maintain a used car lot for the sale or use of secondhand cars without the payment of an additional license tax. Upon the payment of the license tax prescribed in this section, such dealer shall not be required to pay the license tax as provided in Sections 40-12-53 through 40-12-55, 40-12-60, 40-12-62 and 40-12-169. (Acts 1939, No. 370, p. 497; Code 1940, T. 51, § 462.)

§ 40-12-52. Automobile salesmen.

Each person, dealer or agent selling, offering to sell or soliciting orders for the sale of motor vehicles to the ultimate consumer who does not maintain a regularly established place of business in this state for the sale of such motor vehicles shall be required to pay an annual license tax of $200.00 for use of the state and $100.00 for use of the county. Both a state and county license tax shall be payable in each county in which such person engages in any of the activities herein mentioned in this section. (Acts 1939, No. 370, p. 497; Code 1940, T. 51, § 463; Acts 1943, No. 315, p. 305; Act 1965, 2nd Ex. Sess., No. 85, p. 116; Acts 1971, No. 787, p. 1520.)

§ 40-12-53. Automobile accessory dealers.

Each person selling motor vehicle accessories, including automobile radios, air-conditioning units, motor ve-

hicle parts, motor vehicle batteries and tires, shall pay the following annual license tax in cities of:

Over 100,000 population	$40.00
25,000 to 100,000 population	30.00
5,000 to 25,000 population	20.00
2,000 to 5,000 population	10.00
All other places, whether incorporated or not	5.00

Regularly licensed filling stations or garages are not required to pay the above accessories license tax if their stock of accessories at any time does not exceed the wholesale value of $75. (Acts 1935, No. 194, p. 256; Acts 1939, No. 596, p. 966; Code 1940, T. 51, § 465; Acts 1959, No. 476, p. 1195.)

§ 40-12-54. Automobile garages and shops.

Garages or shops where automobiles or other motor vehicles are repaired, painted, trimmed or welded for the public shall pay the following license taxes: each shop where the work is done by one man, $5; each shop where the work is done by two men, $10; each shop where the work is done by more than two men shall pay a license of $10, and an additional license of $5 for each workman in excess of two so employed. Where garage or shop owners do work in shops they shall be counted as workmen. The maximum number of men employed at any time during the license year shall be the basis of computing the license due. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 466.)

§ 40-12-55. Automobile storage garages.

For each garage where a charge is made for the storage of motor vehicles there shall be a license tax of $2 for each 1,000 square feet or fraction thereof up to 50,000 square feet. On each 1,000 square feet or fraction thereof in excess of 50,000 square feet, the license tax

shall be $1 on each additional square footage of space. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 467.)

§ 40-12-56. Automobile storage other than in garages.

Each lot or place other than a storage garage where a charge is made for storage of motor vehicles shall pay the following annual license tax: for each 1,000 square feet or major fraction thereof up to 50,000 square feet, $1; on each 1,000 square feet or major fraction thereof in excess of 50,000 square feet the license tax shall be $.50. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 468.)

§ 40-12-57. Automobile tire retreading shops.

Retreading or tire rebuilding shops where motor vehicle tires are retreaded shall pay a license tax of $20. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 469.)

§ 40-12-58. Barbers.

Each person engaged in the business of operating a barbershop shall pay a license fee of $2.50 for each chair. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 470.)

§ 40-12-59. Baseball parks.

Each owner or lessee of a baseball park where admission fees are charged shall pay the following license taxes: in cities or towns of less than 10,000 inhabitants, or within five miles thereof, $10; in cities or towns of 10,000 and less than 25,000 inhabitants, or within five miles thereof, $25; in cities and towns of 25,000 inhabitants and less than 50,000 inhabitants, or within five miles thereof, $50; in cities and towns of 50,000 inhabitants or more, or within five miles of any such city or town, $100; provided, that when baseball is allowed by law to be played in any city or town on Sunday, the license tax therefor in such city or town shall be double the amount

hereinbefore named. This section shall not apply to baseball parks owned or maintained in good faith by educational institutions located in this state. The provisions of this title permitting the payment of a half-year license after April 1 shall not apply to this section. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 471.)

§ 40-12-60. Battery shops.

Each battery shop for the repairing and recharging and selling of batteries shall pay the following license taxes: in cities and towns of over 60,000 inhabitants, $20; in cities and towns of 16,000 inhabitants and not over 60,000 inhabitants, $15; in cities and towns of 5,000 and not over 16,000 inhabitants, $10; in all other places, whether incorporated or not, $5. The above license tax shall not apply unless a complete battery service is rendered. Each manufacturer of batteries shall pay a license tax of $100; provided, that such manufacturer paying the license hereunder shall not be required to pay the license under Section 40-12-172. (Acts 1935, No. 194, p. 256; Acts 1939, No. 597, p. 967; Code 1940, T. 51, § 472; Acts 1943, No. 567, p. 569.)

§ 40-12-61. Beauty parlors, etc.

Each person operating what is generally known as a beauty parlor or other place where hairdressing, facial treatments, manicuring or hair waving is done shall pay a license tax of $10 and for each operator so employed, as follows: in cities of more than 60,000 inhabitants, $6; in cities of less than 60,000 inhabitants and all other places whether incorporated or not, $4. This schedule of fees shall apply to beauty parlor colleges where said colleges engage in beauty parlor work for which a charge is made or material used is charged therefor. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 473.)

§ 40-12-62. Bicycles and motorcycles; dealer tags.

Each person other than a licensee under Section 40-12-51 engaging in the business of dealing in, renting or hiring bicycles or motorcycles shall pay the following license tax: in cities or towns of 20,000 inhabitants or over, $15; in cities or towns of 10,000 to 20,000 inhabitants, $10; in all other places, whether incorporated or not, $5. Each dealer may purchase dealers' tags not to exceed five for any company or firm at a cost of $1 each. Use of these tags for other than demonstration purposes shall constitute a misdemeanor and, upon conviction, shall be punishable by a fine of not less than $5 nor more than $100. (Acts 1935, No. 194, p. 256; Acts 1936-37, Ex. Sess., No. 156, p. 178; Code 1940, T. 51, § 474.)

§ 40-12-63. Blueprint makers.

Each person engaging in the business of making blueprints or developing the same from tracings or drawings for pay shall pay a license tax of $15 for engaging in such business. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 475.)

§ 40-12-64. Bond makers.

Each person engaged in the business of making bonds and charging for the same, except guaranty companies or corporations otherwise specifically licensed, shall pay a license tax of $100 per annum. The payment of the license tax required by this section shall authorize the doing of business only in the town, city or county where paid. No person engaged in the business of making bonds and charging for the same shall be exempt from paying said license tax. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 477.)

§ 40-12-65. Bottlers.

Each person engaged in manufacturing, producing or bottling in bottles or other containers, soda water, carbonated drinks, fruit juices or imitations thereof, flavored milk and any preparations known as soft drinks shall not use any machine, machines or apparatus for the filling or bottling of the same until such person shall have first applied, paid for and obtained from the probate judge a license. The amount of the license tax for each machine shall be graded or proportioned as follows: on each machine bottling, per minute, less than 16 bottles, $40 state license tax and $40 county license tax; 16 and less than 30 bottles, $90 state license tax and $90 county license tax; 30 and less than 40 bottles, $140 state license tax and $140 county license tax; 40 and less than 60 bottles, $200 state license tax and $200 county license tax; and 60 and less than 75 bottles, $300 state license tax and $300 county license tax; 75 and less than 100 bottles, $325 state license tax and $325 county license tax; 100 and less than 150 bottles, $450 state license tax and $450 county license tax; 150 bottles and over, $500 state license tax and $500 county license tax. Where any person has within his bottling plant or place of manufacture more than one bottling machine, then such person shall pay the license herein specified upon every such bottling machine or apparatus whether in actual operation or not; provided, that such bottling machine or apparatus is in an operating condition. The person applying for such license shall file an application, under oath, stating the name, make, model of his machine, name and address of manufacturer, whether it is low-pressure equipment or high-pressure equipment, or otherwise, contents, capacity of bottles used and giving its bottling capacity.

"Capacity" shall be based on the number of six and one-half ounce bottles that may be bottled per minute as rated by the manufacturer, or the number of such bottles

that are bottled per minute as determined by inspection and actual count, whichever may be greater. Where the machine or apparatus used in the filling and bottling of products covered by this section is also used in the filling and bottling of dairy products, the "capacity" of such machine or apparatus shall be based upon the percentage of time such machine or apparatus is used in the daily operation for the bottling of the products covered by this section. The percentage of time which the machine or apparatus is used for the bottling of products covered by this section shall be determined by inspection and actual count, and where the percentage of time used in the bottling of products covered in this section shall be 20 percent or less of the total operational time, the person so engaged in the bottling of products covered by this section shall pay 20 percent of the amount of the license as proportioned above based upon the number of six and one-half ounce bottles that may be bottled per minute as rated by the manufacturer. Any person using his bottling machinery for the bottling of dairy products and products covered by this section shall be taxed only upon that machine or machines which are used in the bottling of products covered by this section regardless of the number of machines which may be located within his bottling plant or place of manufacture. Bottlers paying the license tax hereunder where such business is engaged in bottling drinks exclusively shall be exempt from payment of transient dealer's license levied under Section 40-12-172 and wholesale bottler's license levied under Section 40-12-70. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 476; Acts 1945, No. 504, p. 729; Acts 1953, No. 704, p. 960.)

§ 40-12-66. Bowling alleys.

Bowling alleys or tenpin alleys for the use of which money or other compensation is charged shall pay a li-

cense tax of $10 for each alley. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 478.)

§ 40-12-67. Brokers and agents of iron, railway, etc., supplies.

Each person, other than a merchant paying an ad valorem tax on his stock of goods, who shall as agent or broker sell iron, railway supplies, furnace supplies or mining supplies, shall pay a privilege tax of $25. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 479.)

§ 40-12-68. Brooms, brushes, mops, etc.

Each person operating a manufactory plant for the making of brooms, brushes, mops or similar articles shall pay a license tax of $10; provided, that this shall not apply to blind persons. Such license tax shall not apply where not more than three persons are employed for the making of said brooms. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 480.)

§ 40-12-69. Cereal beverages, carbonated or other soft drinks — Retailers.

(a) Each person engaged in the business of selling at retail cereal beverages, carbonated or other soft drinks in bottles, cans or other sealed containers shall pay an annual license tax of $2.50.

(b) Each person engaged in the retail business of selling soft drinks in whatever form, by means of taps or other dispensing devices, shall pay annually the following license taxes: in unincorporated places, and towns and cities of not over 5,000 inhabitants, $10; in cities and towns of over 5,000 and not over 15,000 inhabitants, $15; in cities of over 15,000 and not over 25,000 inhabitants, $20; in cities of more than 25,000 inhabitants, $25. A person licensed under this subsection shall be thereby

also licensed to sell at retail cereal beverages, carbonated or other soft drinks in bottles, cans or other sealed containers without the payment of the license imposed in subsection (a) of this section. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 482.)

§ 40-12-70. Cereal beverages, carbonated or other soft drinks — Wholesalers.

Each person engaged in the business of selling at wholesale nonalcoholic, carbonated or other soft drinks shall pay an annual license tax of $50; provided, that bottlers who have taken out the bottle license for operating plants in this state shall not be liable under this section, nor shall such bottlers be liable for any county or state license under Section 40-12-174, nor as transient vendors or dealers or peddlers. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 483.)

§ 40-12-71. Certified public accountants.

(a) In lieu of any other privilege license fees levied under the revenue laws of the State of Alabama, each person who holds a certificate as a certified public accountant and who is a resident of the State of Alabama and who is engaged in the practice of public accounting in the State of Alabama shall pay an annual license fee of $25, but no license fee shall be paid to the county. Such license shall be obtained from the probate judge or licensing agency in the county where the business of a certified public accountant is located and shall be due and delinquent as provided by Section 40-12-26. All money paid into the treasury for license under this section shall be deposited in the State Treasury to the credit of the Alabama State Board of Public Accountancy and shall constitute a separate fund to be disbursed as provided in subsection (b) of this section.

(b) The fund provided by subsection (a) of this section shall be used by the Alabama State Board of Public Accountancy to defray the expenses for administering and enforcing the laws of the State of Alabama pertaining to the practice of public accounting and the other necessary purposes and expenses of said board not otherwise available and provided pursuant to Section 34-1-3; and the said Alabama State Board of Public Accountancy shall have the power to direct the disbursement of said fund, which shall be paid on the warranty of the State Comptroller upon certificate or voucher of the secretary of said board, approved by the chairman or vice-chairman of said board. No funds shall be withdrawn or expended except as budgeted and allotted according to the provisions of Article 4 of Chapter 4 of Title 41, and only in amounts as stipulated in the general appropriations bill.

(c) No license fee as herein provided shall be due or payable by any certified public accountant employed by any state or federal government agency, educational institution or industry, who does not perform public accounting service for which he is paid. (Acts 1969, No. 269, p. 599, § § 1-3.)

§ 40-12-72. Cigars, cigarettes, cheroots, etc. — Retailers.

Each retail dealer in cigars, cheroots, stogies, cigarettes, smoking tobacco, chewing tobacco or snuff, or any substitute therefor, either or all, shall pay to the state the following privilege license tax: in cities of 25,000 inhabitants and over, $15; in cities or towns of 10,000 inhabitants and less than 25,000 inhabitants, $10; in cities or towns of 5,000 inhabitants and less than 10,000 inhabitants, $5; in cities or towns of 2,000 inhabitants and less than 5,000 inhabitants, $3; in all other places, whether incorporated or not, $2. This privilege license tax is levied on each place of business owned or operated by retail dealers, whether under the same roof or not. The phrase "retail dealer" as used in this section shall include every person, firm, corporation, club or association, other than a wholesale dealer as defined in Section 40-12-73, who shall sell or store or offer for sale any one or more of the articles enumerated herein, irrespective of quantity or amount, or the number of sales. The privilege license tax herein defined shall be in addition to the sales tax as provided in Section 40-25-2. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 484.)

§ 40-12-73. Cigars, cigarettes, cheroots, etc. — Wholesalers.

Each wholesale dealer in cigars, cheroots, stogies, cigarettes, smoking tobacco, chewing tobacco, snuff or any substitute therefor, either or all, shall pay one privilege license tax to the state of $100 and $5 to each county in which such wholesale dealer does business. The phrase "wholesale dealer" as used in this section shall include persons, firms, corporations, clubs or associations who shall sell or store or offer to sell any one or more of the articles enumerated herein to retail dealers for the purpose of resale only. The privilege license tax herein levied shall be in addition to the sales tax as provided in Section 40-25-2. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 485.)

§ 40-12-74. Circuses.

Each person operating a circus shall pay the following license tax: where the seating capacity of the circus is less than 2,000, $50; where the seating capacity is 2,000 and less than 4,000, $100; where the seating capacity is 4,000 or more, $200; and the license tax hereinabove provided shall include the license tax for a menagerie accompanying the circus. The payment of the proper license tax, as

is herein provided, will entitle the circus to operate for one week in the same place and at the same time on the same license. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 486; Acts 1953, No. 745, p. 1008; Acts 1967, No. 411, p. 1067.)

§ 40-12-75. Cleaning and pressing establishments.

Each person conducting what is commonly known as a cleaning or pressing business, where wearing apparel is cleaned or pressed, shall pay a license tax of $5 in all places of less than 10,000 inhabitants, whether incorporated or not; in cities or towns of 10,000 inhabitants and less than 50,000 inhabitants ,$10; in cities of 50,000 inhabitants or more, $15; provided, that where dyeing is done singularly or in conjunction with the cleaning and pressing business, $10 additional. Each place maintained or operated for the reception or collection of such articles and not at the location of such pressing, cleaning or dyeing plant paying a license as such shall pay a license tax of $5. A person not having a place of business within the State of Alabama where such work is actually performed shall pay a license tax of $15 for the reception and collection of such articles. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 487.)

§ 40-12-76. Coal and coke dealers — Maintaining yards.

Each person dealing in coal or coke and maintaining one or more established yards, with adequate wagon or truck scales, from which retail deliveries are loaded, shall pay the following license tax for each yard: in cities or towns of 5,000 inhabitants or less, whether incorporated or not, $5; in cities of more than 5,000 and not more than 20,000 inhabitants, $10; in cities of more than 20,000 inhabitants, $20. This section and Section 40-12-77 shall not apply to persons whose inventory and sales

are in quantities of less than one-half ton. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 488.)

§ 40-12-77. Coal and coke dealers — Not maintaining yards.

Each person, other than those qualifying under Section 40-12-76, engaged in selling, distributing or hauling or delivering coal or coke by truck or other vehicle, whether as dealer, employee, agent, broker, sales agent or mining company who sells, hauls or delivers direct from mine or plant to consumer shall pay a privilege license tax on the first truck or other vehicle used in said business of $15, and on each additional truck or vehicle $3, but the provisions of this section shall not apply to persons whose inventory and sales are in quantities of not more than one ton, and in no event shall this license be issued for less than one year, such license to be in addition to the regular motor vehicle license. Each such person shall register each truck or other vehicle so used in such business in the county in the office collecting and issuing licenses. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 489.)

§ 40-12-78. Coffins and caskets — Manufacturers.

Each manufacturer of coffins or caskets shall pay a license tax of $100. This license tax shall not apply to any person who manufactures coffins or caskets without the assistance of any other person or without the assistance of hired labor and which coffins or caskets retail for not exceeding $10. This section shall not apply to local woodworking plants or carpenter shops whose principal business is not the manufacturing of coffins or caskets and who make coffins for paupers for local governing bodies or for charity. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 490.)

§ 40-12-79. Coffins and caskets — Dealers and agents.

Each dealer in coffins or caskets and each agent or person taking or soliciting orders for retail deliveries of coffins or caskets shall pay the following license tax: in unincorporated places or towns of 1,000 inhabitants or less, $10; in towns and cities of over 1,000 inhabitants and not exceeding 7,000 inhabitants, $20; in cities of over 7,000 and not exceeding 35,000 inhabitants, $50; in cities of over 35,000 inhabitants, $100. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 491.)

§ 40-12-80. Collection agencies.

Each collection agency shall pay the following license tax: in towns and cities of 20,000 or more inhabitants, $100; in towns and cities of less than 20,000 inhabitants, $25. Each person who shall employ agents to solicit claims for collection from persons, firms or corporations in the state shall be deemed a collection agency within the meaning of this section. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 492.)

§ 40-12-81. Commission merchants or merchandise brokers.

Each commission merchant or merchandise broker shall pay one state license tax of $25 and one county license tax of $12.50. Such payment shall be made in the county in which such commission merchant or merchandise broker maintains his principal place of business. Such license shall authorize such commission merchant or merchandise broker to do business in any county of the state without the payment of any further state or county license tax. The payment of the license tax in one county of the state as evidenced by the license certificate of the probate judge shall be sufficient. (Acts 1935, No.

194, p. 256; Code 1940, T. 51, § 493; Acts 1943, No. 418, p. 384.)

§ 40-12-82. Concerts, musical entertainments, etc.

For each concert, musical entertainment, public lecture or other public entertainment where charges are made for admission, or for the use of any instrument or device or the participation in any exercises or entertainment not given wholly for charitable, school or religious purposes and not otherwise provided for, the license tax shall be $10; but this provision shall not apply to exhibitions or entertainments given in theaters when the owners or managers thereof have taken out licenses as owners or managers; and provided further, that this license tax shall not be charged for any lecture course given as part of the course of instruction in any educational institution; provided further, that the provisions of this section shall not apply to chautauquas, lecture lyceums or exhibits held under the auspices of religious or charitable associations. In all cases where such exhibitions shall be in the nature of a continuous show or performance, the license tax shall be $5 per day, $15 per week or $30 per month. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 494.)

§ 40-12-83. Conditional sales contracts, drafts, acceptances, etc.; dealers in.

(a) Each person engaged in discounting or buying conditional sales contracts, drafts, acceptances, notes or mortgages on personal property shall pay an annual license tax as follows: employing capital of $50,000 or less, $5; $50,000 to $100,000, $10; $100,000 to $150,000, $15; $150,000 to $300,000, $25; $300,000 to $500,000, $100; $500,000 and up, $300, the payment of which shall be sufficient to engage in business in any county of the state except the county in which the principal office is located,

in which case the county license tax shall be one half of the above schedule.

(b) Each person engaging in business of lending money on salaries or making industrial or personal loans shall pay an annual license tax of $100 for each county in which he engages in business. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 495; Acts 1953, No. 680, p. 934.)

§ 40-12-84. Construction companies or contractors.

Any person, firm or corporation accepting orders or contracts for doing any work on or in any building or structure requiring the use of paint, stone, brick, mortar, wood, cement, structural iron or steel, sheet iron, galvanized iron, metallic piping, tin, lead, electric wiring, or other steel or any other building material, or accepting contracts to do any paving or curbing on sidewalks or streets, public or private property, using asphalt, brick, stone, cement, wood or other composition, or accepting orders for or contracts to excavate earth, rock or other material for foundations or any other purpose, or accepting orders or contracts to construct any sewer of stone, brick, terra cotta or other material, or accepting contracts to construct highways, bridges, dams or railroads, shall be deemed a contractor. Every contractor shall procure from the probate judge of the county in which he has his principal office a license to carry on the business of a contractor; provided, that if such contractor has no such office in this state, then he shall procure such license from the probate judge of the county where the contract is to be performed. Every such contractor shall pay a license tax to be ascertained on the basis of the gross amount of all orders or contracts accepted, exclusive of orders or contracts pertaining to state or county road and bridge projects, as follows: If the gross amount of all orders or contracts accepted aggregates $5,000 and not exceeding $10,000, he shall pay the sum of $10; if the

amount of such orders or contracts is more than $10,000 and does not exceed $20,000, $15; if the amount of such orders or contracts exceeds $20,000 and does not exceed $50,000, $25; if the amount of such orders or contracts exceeds $50,000 and does not exceed $100,000, $50; if the amount of such orders or contracts exceeds $100,000 and does not exceed $150,000, $150; if the amount of such orders or contracts exceeds $150,000 and does not exceed $200,000, $200; if the amount of such orders or contracts exceeds $200,000, $250; and, when such contractor shall have obtained a license for any year for which he has paid a license tax of less than the maximum above prescribed, he shall not accept any contract or contracts during such year, the aggregate amount of which exceeds the maximum amount for which his license was obtained, unless and until he shall have paid such additional sum as will make the total license tax paid by him for that year sufficient to cover the aggregate amount of such contract or contracts as prescribed above; and unless he pays such additional sum he shall be deemed to be acting without a license. The payment of the license tax in one county in the state, as evidenced by the license or official certificate of the probate judge, shall be sufficient. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 496; Acts 1953, No. 749, p. 1012.)

§ 40-12-85. Cotton buyers.

Each person whose principal business is buying cotton shall pay one state license tax of $25 and shall also pay a license tax of $10 in each county in which such person shall maintain an office or buy cotton. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 497.)

§ 40-12-86. Cotton compresses.

For each person operating any compress for the purpose of compressing cotton, the license tax shall be as

follows: for each compress compressing not more than 20,000 bales of cotton per annum, $75; for each compress compressing more than 20,000 bales of cotton and less than 50,000 bales of cotton per annum, $100; for each compress compressing 50,000 bales or more of cotton per annum, $250, such tax to be measured by the number of bales of cotton compressed during the previous year. Each person applying for such license shall file with the probate judge a sworn statement showing the number of bales compressed during the preceding year. A person beginning the operation of a new compress shall be liable for the minimum license tax herein levied for the first year. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 498.)

§ 40-12-87. Cottonseed oil mills, cotton mills, factories, etc.

Every person operating a cottonseed oil mill; cotton mill; cloth mill; towel factory; garment factory; yarn mill; hosiery mill; peanut mill; peanut oil mill; peanut shelling plant; paper mill; pulp mill; mill manufacturing sheeting, rugs, bags, hats, cement, carpets, lime, plaster, soap, chemical, acid (other than fertilizer) explosive; and all mills manufacturing any finished or semifinished products of tobacco, thread, yarn, cloth, fur, felt, nylon, paper, jute, rubber, iron, iron ore, copper, brass, tin, coal, coke, sand, cement, glass, clay, slag, aluminum, bauxite, ore, grain, other than what is commonly called a grist mill, oats, corn, rye, synthetic rubber, stone, oil, crude oil, tar, resin, asphalt, paraffin, plastics, fibers, straw, cellulose or other factory where materials are woven, made or assembled shall pay the following license tax: $10 where the investment for plant, equipment, supplies and fixtures is less than $15,000; $20 where the investment for plant, equipment, supplies and fixtures is $15,000 and less than $25,000; $30 where the investment for

plant, equipment, supplies and fixtures is $25,000 and less than $50,000; $50 where the investment for plant, equipment, supplies and fixtures is $50,000 and less than $100,000; $100 where the investment for plant, equipment, supplies and fixtures is $100,000 and less than $500,000; $150 where the investment for plant, equipment, supplies and fixtures is $500,000 and less than $1,000,000; $200 where the investment for plant, equipment, supplies and fixtures is $1,000,000 and over. Such investment shall be the total capital employed in such plant, and the person applying for such license shall furnish a sworn statement showing the amount of the investment and shall accompany the same with a statement taken from the books of the company, showing the amount of such investment, and such books shall at all times be subject to the inspection of the Department of Revenue or its agents. The license taxes levied under this section shall not apply where the factory, mill or plant which would be licensed by this section is covered by a specific license under this article. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 499; Acts 1947, No. 136, p. 44.)

§ 40-12-88. Cotton warehouses.

Each person operating a warehouse or yard for the storage of cotton for compensation shall pay a license tax to the state as follows: every such warehouse storing not more than 5,000 bales in the preceding calendar year, $20; more than 5,000 and not more than 10,000 bales, $40; more than 10,000 and not more than 15,000 bales, $60; more than 15,000 and not more than 20,000 bales, $100; more than 20,000 and not more than 30,000 bales, $150; more than 30,000 bales, $200. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 500.)

§ 40-12-89. Credit agencies.

(a) Each person, firm or corporation inquiring into and reporting on the credit and standing of persons, firms or corporations in this state shall pay the following license tax:

(1) In each county where the population exceeds 300,000, a state license tax of $200 for each place of business and a county license tax of $50;

(2) In each county where the population exceeds 200,000, but is not more than 300,000, a state license tax of $150 for each place of business and a county license tax of $50;

(3) In each county where the population exceeds 100,000, but is not more than 200,000, a state license tax of $100 for each place of business and a county license tax of $25;

(4) In each county where the population exceeds 50,000, but is not more than 100,000, a state license tax of $50 for each place of business and a county license tax of $25; and

(5) In all other counties, $25 to the state for each place of business and $12.50 to the county.

(b) This section shall not apply to mutual trade organizations where credit information is exchanged among members at actual cost of service.

(c) Where any person shall pay to the state the license tax of $200 for an office which supervises the operations of suboffices under its jurisdiction, no additional state license tax shall be due for such suboffice, but a county license tax of $50 shall be paid in each county in which a suboffice is located.

(d) The population shall be according to the last or any subsequent federal decennial census. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 501; Acts 1953, No. 468, p. 584; Acts 1963, No. 566, p. 1189.)

§ 40-12-90. Creosoting, etc.

Each person operating a creosoting or other preservative treatment plant, where crossties, crossarms, poles, posts or other lumber or timbers are creosoted or treated shall pay a license tax based on the capital invested in such plant for equipment, raw materials, finished materials, supplies, realty and all personalty, as follows: where the capital invested is less than $5,000, $20 for the state and $10 for the county; where the capital invested is $5,000 and less than $25,000, $50 for the state and $25 for the county; where the capital invested is $25,000 and less than $50,000, $75 for the state and $37.50 for the county; where the capital invested is $50,000 or over, $100 for the state and $50 for the county. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 502; Acts 1943, No. 419, p. 385.)

§ 40-12-91. Delicatessen shops.

Each delicatessen where cooked foods are sold for consumption other than on the premises shall pay a license tax of $10. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 503.)

§ 40-12-92. Dentists.

Each person practicing the profession of dentistry in cities or towns of over 25,000 inhabitants shall pay an annual license tax of $25; in cities or towns of more than 5,000 and not exceeding 25,000 inhabitants, $15; in cities or towns of more than 1,000 and not exceeding 5,000 inhabitants, $10; in all other places whether incorporated or not, $5; but no license shall be paid the county. If such business is conducted as a firm or as a corporation in which more than one dentist is engaged, each dentist so engaged shall pay the license tax as above stated; provided, that the license tax imposed by the sec-

tion shall not apply until such dentist shall have practiced his profession as long as two years. Seventy-five percent of all moneys paid into the treasury for licenses under this section shall be paid to the secretary-treasurer of the Board of Dental Examiners each year. Such amounts shall be paid annually upon the warrant of the comptroller drawn on the treasury; said funds shall be used by the Board of Dental Examiners to defray the expenses of enforcing the laws of the State of Alabama relating to the practice of dentistry, for other necessary purposes and expenses of such board and in the promotion of the arts and science of dentistry in the State of Alabama. As soon after the first day of each year as practicable, the State Treasurer shall certify to the secretary-treasurer of the Board of Dental Examiners the names of dentists who have paid such license fee. (Acts 1935, No. 194, p. 256; Acts 1935, No. 435, p. 914; Code 1940, T. 51, § 504; Acts 1953, No. 814, p. 1096; Acts 1961, Ex. Sess., No. 59, p. 1927.)

§ 40-12-93. Detective agencies.

Each person engaged in the business of operating a detective agency, or each company or corporation doing business as such in this state, shall pay a license tax of $100. Each person so engaged who also solicits or receives notes or accounts for collection shall pay an additional license tax of $100. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 505.)

§ 40-12-94. Developing and printing films.

Each person engaged in the business of developing and printing Kodak plates or films, or camera plates or films, or other photographic films or plates shall pay a license tax of $5; provided, that this license tax shall not be applicable to any person paying the photographer's

license tax levied by this title. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 506.)

§ 40-12-95. Devices for testing skill and strength used for profit.

For each device used by persons as a source of profit to themselves, such as throwing at wooden figures or any object of like character, striking at an object to test the strength, blowing to test the lungs, or other devices of like character, or for operating a cane rack, a knife rack or similar rack or table, there shall be paid a license tax of $25, in each county in which it is operated, but this section shall not be construed to legalize the operation of any device which is now prohibited by law. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 507.)

§ 40-12-96. Directories.

Each person compiling, selling or offering for sale directories shall pay to the state license taxes as follows: for each city or town of 100,000 inhabitants or over, $150; in cities or towns of 50,000 and less than 100,000 inhabitants, $75; in cities or towns of 20,000 and less than 50,000 inhabitants, $50; in cities and towns of less than 20,000 inhabitants, $15; provided, that this section shall not apply to directories issued by any person in connection with or as a part of a business for which a general license tax is provided. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 509.)

§ 40-12-97. Electric refrigerators, electric or gas heaters, etc.

For each dealer in electric, gas or other mechanical refrigerators, electric or gas heaters, electric or gas water heaters, electric or gas stoves, or for each electrical or gas repair shop, or electrical or gas supply shop there shall

be paid a license tax as follows: in cities of 100,000 inhabitants or over, $30; in cities of 50,000 and less than 100,000 inhabitants, $20; in cities of 10,000 and less than 50,000 inhabitants, $10; and in places of less than 10,000 inhabitants, whether incorporated or not, $5. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 511.)

§ 40-12-98. Embalmers.

Each embalmer shall pay an annual license tax of $10. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 512.)

§ 40-12-99. Engineers.

Each person practicing for the public the profession of civil, electrical, mining, mechanical or radio engineering shall pay an annual license tax of $20 to the state, but no license shall be paid to the county. If such business is conducted as a firm or corporation in which more than one engineer is engaged, each engineer so engaged shall pay a license tax of $20. No such engineer shall be required to pay this license tax until after he has practiced his profession for two years in this state or elsewhere. An engineer who is an employee of the state or of any county or municipality at a fixed salary and who engages in no other engineering work for compensation is not subject to this license tax when so employed. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 522.)

§ 40-12-100. Fertilizer factories.

Each person owning or operating any fertilizer factory shall pay a license tax as follows: in which the capital invested does not exceed $25,000, $50; in which the capital invested exceeds $25,000 and does not exceed $50,000, $100; in which the capital invested exceeds $50,000 and does not exceed $100,000, $200; in which the capital invested exceeds $100,000, $250 for each factory. Each fertilizer mixing plant shall pay a license tax of $15. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 524.)

§ 40-12-101. Fire, closing out, etc., sales.

Each person, other than the original bona fide owners, selling goods, wares or merchandise as an insurance, bankruptcy, mortgage, insolvent, assignee's, executor's, administrator's, receiver's, trustee's, removal or closing out sale, or a sale of goods, wares and merchandise damaged by fire, smoke, water or otherwise, shall pay a license tax of $100. The provisions of this section shall not apply to sheriffs, constables or other public or court officers or to any other persons acting under the license, discretion or authority of any court, state or federal, selling goods, wares or merchandise in the course of their official duties. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 525.)

§ 40-12-102. Fireworks.

Each dealer in fireworks such as roman candles, sky rockets, torpedoes, firecrackers, cannon crackers, cap guns, devil wheels and such other articles commonly known as fireworks shall pay the following license tax: in cities, or within two miles of said cities, of 25,000 population or more, $50; in cities, or within two miles of said cities, of 10,000 population and not more than 25,000, $30; in cities, or within two miles of said cities, of 5,000 to 10,000 population, $20; and in all other places, whether incorporated or not, $10. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 526.)

§ 40-12-103. Flying jennies, merry-go-rounds, etc.

For each flying jenny, called also hobbyhorses, and merry-go-rounds, roller coasters or other devices of like

character, there shall be paid a license tax of $50 per year, $20 for each month or $5 for each week in each place in which such device is operated, whether incorporated or not. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 527.)

§ 40-12-104. Fortunetellers, palmists, clairvoyants, etc.

Each fortuneteller, palmist, clairvoyant, astrologer, phrenologist or crystal gazer, where any fee is charged directly or indirectly or any gratuity is accepted, shall pay a license tax of $40. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 28.)

§ 40-12-105. Fruit dealers.

Each person selling fruit from a fruit stand, store or other established place of business shall pay a license tax as follows: in cities or towns of over 10,000 inhabitants, $10; and in all other places, whether incorporated or not, $5. This section shall not apply to regular merchants carrying fruit as a part of their stock of merchandise who do not display same in front of their place of business and whose ad valorem assessment on the stock of merchandise at the place where such fruit is sold is in excess of $100. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 529.)

§ 40-12-106. Gasoline stations and pumps.

Each person operating for profit a gasoline filling station or pump in cities or towns, or within three miles thereof, shall, on October 1, of each year, pay the following annual privilege tax: in cities of 100,000 inhabitants and over, where only one pump or filler is used, $28 and, for each additional pump, $21; in cities or towns of 40,000 inhabitants and less than 100,000 inhabitants, where only one pump or filler is used, $21 and, for each

additional pump, $14; in cities or towns of 12,000 inhabitants and less than 40,000, where only one pump or filler is used, $18 and, for each additional pump, $10; in cities or towns of 5,000 inhabitants and less than 12,000, where only one pump or filler is used, $14 and, for each additional pump, $7; in incorporated towns of 1,000 inhabitants and less than 5,000, where only one pump or filler is used, $7 and, for each additional pump, $5; in incorporated towns of less than 1,000 inhabitants, $3.50 and, for each additional pump, $2.50; and in all other places, whether incorporated or not, $2.50 and, for each additional pump, $2.50. (Acts 1935, No. 194, p. 256; Acts 1935, No. 402, p. 876; Acts 1939, No. 604, p. 968; Code 1940, T. 51, § 531.)

§ 40-12-107. Glass.

Each person whose principal business is the selling of plate glass or other glass shall pay the following license tax: in cities of 100,000 inhabitants or more, $50; in cities or towns of more than 30,000 and under 100,000 inhabitants, $35; in cities or towns of more than 7,000 and under 30,000 inhabitants, $20; in all other places, $10. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 532.)

§ 40-12-108. Golf, miniature golf, etc., courses.

Each person operating a golf course or courses where the game of golf, miniature golf or a similar game is played, either indoors or out, where a charge is made, shall pay the following license tax: in towns and cities of 500 and not exceeding 10,000 inhabitants, or within 10 miles of the city limits thereof, $10 for each golf course and $5 for each table or course where miniature golf or a similar game is played; in towns or cities of over 10,000 and not exceeding 35,000 inhabitants, or within 10 miles of the city limits thereof, $20 for each golf course and $10 for each table or course where miniature golf or a

similar game is played; in cities having more than 35,000 inhabitants, or within 10 miles of the city limits thereof, $40 for each golf course and $15 for each table or course where miniature golf or similar game is played; and in all other places, whether incorporated or not, for each golf course $5 and for each table or course where miniature golf or a similar game is played, $2.50. This section shall not apply to municipally owned and operated golf courses or tables, nor to regularly organized clubs or other private organizations maintaining and operating a golf course or tables for the use of its members only. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 533.)

§ 40-12-109. Hat-cleaning establishments.

Each person conducting what is commonly known as a hat-cleaning establishment shall pay the following license tax: for each place where such work is actually done, a license tax of $5 in cities and towns of less than 10,000 inhabitants; in cities and towns of 10,000 inhabitants and over, $10 and, in addition, shall pay $5 for each separate place of business within this state owned or operated for the reception and collection of such articles. A person not having a place of business within the State of Alabama where such work is actually performed shall pay a license tax of $5 for each vehicle and for each regular place of business within this state owned or operated or the reception and collection of such articles. This section shall not apply to persons conducting what is commonly known as a cleaning and pressing business who have paid the license tax provided therefor under Section 40-12-75. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 534.)

§ 40-12-110. Hide, fur, etc., dealers.

Each person dealing in hides or furs, whether principal business or not, shall pay the following license tax: in

counties of 100,000 inhabitants or over, $25; in counties of 40,000 inhabitants and less than 100,000 inhabitants, $20; and in counties of less than 40,000 inhabitants, $15. The license herein fixed shall not apply to persons dealing in cattle, sheep, goat or horse hides. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 535.)

§ 40-12-111. Horse show, rodeo, or dog and pony shows.

Every horse show, rodeo, dog and pony show or like exhibition or show, where any charge is made therefor, shall pay a license tax of $25 for each day of performance. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 510; Acts 1967, No. 412, p. 1068.)

§ 40-12-112. Horse, mule, etc., dealers.

Each person engaged in the business of buying, selling, or exchanging horses, mules, jacks or jennets shall pay a license tax of $20 in each county where such person engages in said business. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 536.)

§ 40-12-113. Ice cream.

Each manufacturer of ice cream who sells any part of his output at wholesale shall pay the following license tax: in cities of 35,000 inhabitants and more, $50; in cities of less than 35,000 and not less than 7,000 inhabitants, $10; and in all other places $5. Nothing in this section shall apply to soda fountains and places of like character where the owner or proprietor manufactures ice cream exclusively for service at his established place of business. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 538.)

§ 40-12-114. Ice factories.

Each ice factory shall pay an annual license tax of $1 for each ton capacity per day. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 539.)

§ 40-12-115. Innkeepers and hotels.

Each person keeping a public inn or lodginghouse of five or more bedrooms where transient guests are lodged for pay shall be deemed for the purposes of this title to be engaged in the business of keeping a hotel. A transient guest is one who puts up for less than one week at such hotel, but such a house is no less a hotel because some of the guests put up for longer periods than one week. Every person keeping a hotel, as defined in this section, shall pay an annual license tax as follows: hotels with five rooms and not over 15 rooms, $.50 for each room; hotels with over 15 and less than 50 rooms, $1 for each room; hotels with 50 rooms and less than 100 rooms, $1.50 for each room; and hotels with 100 rooms and over, $2 for each room. If meals, food or refreshments are served to the general public and charged for, then the additional license required to be paid by restaurants, cafes, lunch counters and public eating houses shall be paid. Where cottages or annex are operated in connection with or rented by such hotel, this section shall apply to the total of the rooms in the hotel and the cottages and annex. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 540.)

§ 40-12-116. Junk dealers.

Each junk dealer shall pay the following license tax: in all places of less than 1,000 inhabitants, whether incorporated or not, $10; in towns of 1,000 inhabitants and less than 3,000 inhabitants, or within 10 miles thereof, $20; in cities and towns of 3,000 and less than 10,000 inhabitants, or within 10 miles of the city limits thereof, $30; in cities and towns of 10,000 and less than 20,000 inhabitants, or within 10 miles of the city limits thereof, $50; in cities and towns of 20,000 inhabitants and less than 50,000 inhabitants, or within 10 miles of the city limits thereof, $75; and in cities and towns of 50,000 inhabitants and over or within 10 miles of the city limits thereof, $150. Each junk dealer, his clerk, agent or employee shall keep a book open to inspection in which he shall make entries of all articles of railroad iron or brass, pieces of machinery and plumbing material, automobiles, automobile tires, parts and accessories, or other articles purchased by him, together with the name of the party from whom purchased; and, upon failure to keep such book or record and produce it on demand, the dealer shall forfeit his license. Each junk dealer, his clerk, agent or employee to whom any new and unused articles or railroad brass and iron, pieces of machinery, automobiles, automobile tires, parts and accessories or other articles shall be presented for sale shall notify the police authorities that such articles are offered for sale within a reasonable time thereafter, otherwise, his license shall be forfeited. Any junk dealer whose place of business is within 10 miles of more than one city shall pay the license as provided herein for the larger of the cities within 10 miles. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 541.)

§ 40-12-117. Laundered towel, apron, etc., rentals; diaper services.

(a) Each person renting or supplying laundered towels, aprons, coats, linens or supplying other similar service, except those persons engaged in the business of renting diapers who do not rent or supply laundered towels, aprons, coats or linens shall pay the following license tax: in cities of 100,000 inhabitants or over, $50;

in cities or towns of 60,000 and less than 100,000 inhabitants, $35; in cities or towns of 25,000 and less than 60,000 inhabitants, $25; in cities and towns of 10,000 and less than 25,000 inhabitants, $15; and all other places, whether incorporated or not, $10. This section shall not apply to regular laundries which have paid the license taxes on laundries levied by this title. (b) Each person furnishing diaper service or laundered diapers shall pay a license tax of $50 in the county in which he maintains his principal place of business and shall pay a license tax of $7 in each county wherein he engages in the business of furnishing diaper service or laundered diapers other than the county of his principal place of business. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 542; Acts 1953, No. 760, p. 1022.)

§ 40-12-118. Laundries.

Each person, firm or corporation who operates what is commonly known as a power or steam laundry shall pay the following license tax: in cities and towns of 35,000 inhabitants and over, $60; in cities and towns of less than 35,000 and not less than 15,000 inhabitants, $30; in cities and towns of less than 15,000 and not less than 5,000 inhabitants, $15; and in all other places, whether incorporated or not, $10. Self-service laundries or concerns commonly known as launderettes shall pay a license tax of 25 percent of the power or steam laundry license. Each laundry operated by hand power shall pay a license tax of $10; provided, that no license shall be required of a person commonly known as a "washwoman." Hotels which operate laundries exclusively for their own guests shall pay a license tax of 25 percent of the foregoing enumerated amounts for power or steam laundries. A person not having a place of business within the State of Alabama where such work is actually performed shall pay a license tax of $25 for the reception or collection of

laundry. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 543; Acts 1950, 5th Ex. Sess., No. 41, p. 85.)

§ 40-12-119. Legerdemain and sleight of hand.

Each exhibition of feats of legerdemain or sleight of hand or other exhibition or entertainment of like kind shall pay an annual license tax of $5. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 544.)

§ 40-12-120. Lightning rods.

Each person selling or installing lightning rods who maintains his principal and permanent place of business within this state shall pay a license tax of $7.50 to the state and $2.50 to the county in which the principal place of business is located. Each person who sells or installs lightning rods, but whose primary business is not the selling or installing of lightning rods or who does not maintain his principal and permanent place of business within this state, shall pay a license tax of $150 to the state and $75 to the first county in which he does business and for each succeeding county in which he does business an additional license tax of $50, to be divided $37.50 to the state and $12.50 to the county. Each person selling lightning rods in this state shall register with the state fire marshal and furnish his name and address and any other information requested by the fire marshal. Failure to notify the fire marshal of a change of address within 10 days from such change shall constitute a misdemeanor. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 545; Acts 1971, 1st Ex. Sess., No. 132, p. 213.)

§ 40-12-121. Lumber and timber dealers.

Each wholesale dealer or jobber of lumber and timber and each wholesale dealer in lumber and timber on commission whether maintaining an established place of

business or not shall pay a license tax of $100. A sawmill operator, regularly licensed under Section 40-12-154, shall not become liable for the license tax imposed by this section by reason of his purchasing partially manufactured lumber from other sawmills, if the processing of said partially manufactured lumber is completed at the plant of the sawmill operator so purchasing the same and the lumber is thereafter shipped or sold in the same manner as lumber manufactured at the plant of such operator; provided, that such purchases do not exceed in volume the lumber manufactured by such operator at his own plant or plants. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 546; Acts 1945, No. 460, p. 693.)

§ 40-12-122. Lumberyards.

Each person operating a lumberyard shall pay the following license tax: in cities of 100,000 inhabitants and over, $75; in cities of less than 100,000 and not less than 35,000 inhabitants, $40; in cities of less than 35,000 and not less than 7,000 inhabitants, $25; in cities of less than 7,000 inhabitants and not less than 1,000 inhabitants, $10; and in all other places, whether incorporated or not, $5. This section shall not apply to a regularly licensed sawmill selling lumber at retail at its plant. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 547.)

§ 40-12-123. Machinery repair shops.

Each person operating a shop for the repair or rebuilding of machinery or making parts therefor for the public and charging for same shall pay the following license tax: in cities or towns of 100,000 or more inhabitants, $40; in cities or towns of 50,000 and less than 100,000 inhabitants, $25; in cities or towns of 15,000 and less than 50,000 inhabitants, $15; and in all other places, whether incorporated or not, $5. This license shall not

apply to what is commonly known as a blacksmith shop or to shops repairing automobiles where a garage license or an automobile repair license has been taken out. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 548.)

§ 40-12-124. Manicurists, hairdressers, etc.

Each person engaging in the business of manicuring, hairdressing or administering facial treatments shall pay a license tax of $5; provided, that this section shall not apply to such persons employed in beauty shops and beauty shop colleges, paying the license tax as provided under Section 40-12-61. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 549.)

§ 40-12-125. Mattresses, cushions, pillows, etc.

Each person engaging in the business of manufacturing or upholstering cushions, mattresses, pillows or rugs, or the renovating, cleaning or reworking of same, shall pay for the privilege of engaging in such business, $15; provided, that the license tax shall be $5 in towns of 3,000 or less population. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 551.)

§ 40-12-126. Medicine, chemistry, bacteriology, etc.

Each person engaged in the practice of medicine, chemistry, bacteriology, roentgenology or other similar profession, except chemists, bacteriologists, and roentgenologists employed full time by physicians, nonprofit scientific institutions, and hospitals, and except doctors employed exclusively by a medical college, shall pay the following annual license tax: in cities or towns of over 5,000 inhabitants, $25; 1,000 to 5,000 inhabitants, $10; all other places, whether incorporated or not, $5, but no license tax shall be paid to the county. If such business is conducted as a firm or as a corporation in which more

than one person is engaged, each person so engaged shall pay the license tax as above stated. The license tax imposed by this section shall not apply until such person shall have practiced his or her profession as long as two years. Two fifths of the annual license tax herein levied shall remain in the treasury and shall constitute a separate fund to be disbursed by the treasurer as follows: All of such fund arising from licenses paid in each of the separate counties of the state shall be set aside in a separate fund for such county and shall be disbursed by the treasurer, on the order of the board of censors of the medical society of such county, if there is such organization in such county. (Acts 1935, No. 194, p. 256; Acts 1936-37, Ex. Sess., No. 181, p. 210; Code 1940, T. 51, § 552; Acts 1957, No. 379, p. 508.)

§ 40-12-127. Mimeographs, duplicating machines, dictaphones, etc.

Every person engaged in the business of selling or soliciting orders for the sale or purchase of mimeographs, duplicating machines, dictaphones, teletypes or other similar machines, and except any person regularly employed by a said agent of or dealer in which said agent of or dealer in has paid the privilege tax or license tax herein provided for, the following annual privilege tax shall be levied and collected: in counties of over 100,000 inhabitants, $30; in counties of over 60,000 inhabitants and not exceeding 100,000 inhabitants, $20; in counties of over 40,000 inhabitants and not exceeding 60,000 inhabitants, $15; and in counties of 40,000 inhabitants and less, $10. Such license shall not authorize such agent or dealer to do business in any other county than that in which the license is issued, but if such agent or dealer shall do business in any other county than that in which he has secured the license above provided, he shall pay an additional license in each such county where he solic-

its business of one fourth of the above enumerated amounts. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 554.)

§ 40-12-128. Mining of iron ore — Levy and amount of tax; limitation of actions.

Every person engaged in the business of mining iron ore or operating an iron ore mine in the State of Alabama shall pay to the State of Alabama a license or privilege tax by the twentieth of each month for the privilege of operating said iron ore mine during the current month in which such payment is due an amount equal to $.03 per ton, of 2,240 pounds, on all iron ore mined during the last preceding month in which said mine was operated according to the run of the mine, whether such mine is an open mine or an underground mine, but no such tax shall be paid to any county in this state. Railroad weights shall govern where said iron ore is loaded on railroad cars in determining the amount of iron ore mined. In order that the industrial development of the state may be best preserved and promoted and in order that any deleterious effect of the tax levied in this section may be minimized, the Department of Revenue is authorized and empowered to lower, with the approval of the Governor, as in its knowledge of prevailing conditions may, from time to time prove expedient and advisable for the best welfare of the state, but not to raise, the rate on which the tax is computed. Any action by the state for the recovery of the tax levied under this section shall be commenced, or the assessment therefor made, within 12 months from the shipment by any means of such iron ore from the mine. Unless commenced within such period, the same shall be forever barred. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 556; Acts 1943, No. 525, p. 491.)

§ 40-12-129. Mining of iron ore — Report of operators.

Every person, partnership, joint stock company, or association engaged in the business of mining iron ore or coal in this state shall, by the twentieth day of each month, make a report, duly sworn to before some officer authorized to administer oaths, to the Department of Revenue of the number of tons of iron ore or coal mined during the preceding month according to the run of the mine and where mined by such person in this state. Every person engaged in operating or assisting to operate in any capacity whatsoever any coal or iron ore mine in this state, upon the output of which a report has not been made as provided herein upon which the license or privilege tax has not been paid and is past due, shall be guilty of a misdemeanor and, upon conviction therefor, shall be fined not less than $10 nor more than $500, and may also be sentenced to hard labor for the county for not more than six months. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 557.)

§ 40-12-130. Mining of iron ore — Report of persons receiving products.

Every person or corporation receiving coal or iron ore from any mine in this state for transportation or use shall render to the Department of Revenue by the twentieth day of each month a statement in writing, duly sworn to by some person having knowledge of the facts before some officer authorized by law to administer oaths, of the number of tons so received during the preceding month. Every person receiving coal or iron ore from any mine in this state and transporting the same in motor trucks shall, in addition to the above requirements, show to whom and where each ton of coal or iron ore was delivered. Every person or corporation receiving coal or iron

ore from any mine in this state for transportation or use, who shall fail by the twentieth day of the succeeding month to render the statement required herein, shall be guilty of a misdemeanor and, upon conviction therefor, shall be fined not less than $10 nor more than $500. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 558.)

§ 40-12-131. Monuments and tombstones.

Each person who sells or erects monuments or tombstones in the state shall pay an annual license tax of $5 for each county in which he sells or erects such monument or tombstone; provided, that this shall not apply to benevolent and fraternal societies that place monuments at the graves of their members. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 559.)

§ 40-12-132. Moving picture shows — Transient operators.

Every person operating what is known as a transient moving picture show to which an admission is charged, in tents or otherwise, shall pay a license tax of $50 for the first week and $25 per week for each additional week or portion thereof for each place where a performance is held, and this license tax shall be payable $50 in advance of opening for exhibition and $25 in advance, each week, thereafter. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 560.)

§ 40-12-133. Moving picture shows — Permanent operators.

Every person engaging or continuing in the business of operating a moving picture show, or show of like character, to which admission is charged shall pay the following license tax: in cities of 35,000 inhabitants and over, $200; in cities and towns of less than 35,000 and not less than

7,000 inhabitants, $50; in all other places, $15; provided that, in cities of 35,000 inhabitants or over in which the theater is one mile or more from the city hall, the license shall be $60 per annum. Moving picture shows under this section shall be held to mean a show, the principal featuring of which is moving pictures and for which is required an annual privilege license in Alabama and shall be conducted within a building arranged or constructed for such purpose, and no additional license shall be required if other features of entertainment, including vaudeville acts, are given during any period for which an admission is charged. Any motion picture theater charging children under 12 years of age more than one half of the admission charged adults shall pay double the amount herein levied under this section; provided, that this shall not apply where admission charged such children does not exceed $.10. (Acts 1935, No. 429, p. 901; Code 1940, T. 51, § 561.)

§ 40-12-134. Newsstands.

Each person operating a newsstand for the sale of magazines or periodicals shall pay an annual license tax of $5. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 563.)

§ 40-12-135. Oculists, optometrists and opticians.

Each oculist, optometrist or optician practicing his profession shall pay the following license tax: in cities or towns of over 5,000 inhabitants, $25; in cities and towns of 1,000 to 5,000 inhabitants, $10; and all other places, whether incorporated or not, $5, but no license shall be paid to the county. If such business is conducted as a firm or as a corporation in which more than one person is engaged, each oculist, optometrist or optician so engaged shall pay the license as above stated; provided, that

the license imposed by this section shall not apply until such oculist, optometrist or optician shall have practiced his profession as long as two years. A licensee having procured a license in the city or town where he has his principal office may practice his profession in any other place without the payment of an additional license. (Acts 1935, No. 194, p. 256; Acts 1936-37, Ex. Sess., No. 218, p. 259; Code 1940, T. 51, § 564.)

§ 40-12-136. Osteopaths and chiropractors.

Each osteopath or chiropractor practicing his profession shall pay an annual license tax of $20 to the state, but no license shall be paid to the county. If such business is conducted as a firm or corporation in which more than one person is engaged, each osteopath or chiropractor so engaged shall pay a license tax of $20. No osteopath or chiropractor shall be required to pay a license until after he has practiced his profession for two years. Of the license fee prescribed herein for chiropractors, but not for osteopaths, one fourth of the amount collected shall be paid into the state general fund and three fourths of the amount collected shall be paid into the state treasury to the credit of the State Board of Chiropractic Examiners. That portion paid into the credit of the State Board of Chiropractic Examiners shall be used by the board for the purposes stipulated in Section 34-24-143. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 565; Acts 1965, 3rd Ex. Sess., No. 39, p. 255.)

§ 40-12-137. Packinghouses, cold storage plants, etc.

Each cold storage plant, packinghouse or refrigerated warehouse used for storage for hire of any food product shall pay a license fee according to the following schedule based on cubic feet of refrigerated space: less than 25,000 cubic feet, $15; 25,000 and not over 50,000 cubic

feet, $20; 50,000 and not over 100,000 cubic feet, $25; 100,000 and not over 200,000 cubic feet, $50; 200,000 cubic feet and over, $100. Operators of refrigerating pipeline for the purpose of refrigerating rooms, premises, goods, wares or merchandise of others for profit shall pay a license tax of $75. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 566; Acts 1955, No. 81, p. 317.)

§ 40-12-138. Pawnbrokers.

Each pawnbroker shall pay a license tax of $250 for each place of business; but, if such pawnbroker sells pistols or sawed-off shotguns or revolvers, however acquired, he shall pay the additional license tax required for dealers in pistols or sawed-off guns or revolvers by this title. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 567.)

§ 40-12-139. Peddlers and itinerant vendors.

(a) Every itinerant vendor or peddler who shall sell or offer for sale any drugs, ointments or medical preparations intended for treatment of any disease or injury, who shall by speech, writing or printing or any other method profess to treat or cure diseases, injury or deformity by any drug, nostrum or medical preparation shall pay an annual license tax of $250 to the state and $125 in each county where he does business, but the license taken out under this section will not be so construed as to authorize the licensee to practice medicine or treat persons for diseases; provided, that the foregoing shall not be construed to apply to the sale of patent or proprietary medicines or household remedies in original or unbroken packages upon which are written or printed directions for use.

(b) Each itinerant vendor or peddler of spices, flavoring, extracts, toilet articles, soaps, insecticides, stock and poultry supplies, proprietary medicines and house-

hold remedies in original packages and other packaged articles of like kind commonly used on the farm and in the home, who uses a motor vehicle solely for the purpose of transporting merchandise from house to house or place to place, who does not use such vehicle for the display of merchandise or as a rolling store and who does not permit purchasers or prospective purchasers to enter said vehicle for the purpose of inspecting or purchasing merchandise shall pay an annual license tax of $7.50 to the state and $7.50 to each county in which he does business; provided, that those who use a vehicle as herein provided, other than a motor vehicle, shall pay an annual license tax of $20 to the state and $10 to each county in which they do business, and those who operate without a vehicle of any kind shall pay an annual license tax of $10 to the state and $10 to each county in which they do business.

(c) Upon the payment of the license fees provided in subsection (b) of this section, the licensee shall be required to pay no other state or county license tax for the privilege of carrying on the business described in said subsection. (Acts 1935, No. 194, p. 256; Acts 1936, Ex. Sess., No. 43, p. 26; Code 1940, T. 51, § 568; Acts 1961, No. 721, p. 1030.)

§ 40-12-140. Photographers and photograph galleries.

Every photograph gallery or person engaged in photography, when the business is conducted at a fixed location, shall pay the following license tax: in cities and towns of 75,000 inhabitants and over, $25 for each fixed location; in cities and towns of less than 75,000 and not less than 40,000 inhabitants, $15 for each fixed location; in cities and towns of less than 40,000 and not less than 7,000 inhabitants, $10 for each fixed location; in cities and towns of less than 7,000 and in all other places whether incorporated or not, $5 for each fixed location.

The payment of such license tax shall authorize the doing of business only in and throughout the county where paid. If the licensee does business in any other county or counties, he shall pay an annual license tax of $5 for each photographer in each additional county in which he does business. Each transient or each traveling photographer having no fixed place of business in the state shall pay a license tax of $10 per annum in each county where he does business. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 569; Acts 1967, No. 213, p. 577.)

§ 40-12-141. Pianos, organs and other musical instruments.

Each person engaged in the business of selling, renting or delivering pianos, organs, small musical instruments or all such articles in this state, either in person or by agent, consignee or broker, shall pay $50 as a license tax to the state for each county in which he has an established place of business, and such license shall permit him to solicit business anywhere in the state; provided, that where such dealer does not have an established place of business in the state but merely sells or solicits the sale of such articles, he shall pay as a state license tax $25 in each county. The provisions of this section shall not apply to general merchants selling as a part of their stock in trade small musical instruments, the selling price of which does not exceed $10; provided, that the license tax on general merchants selling small musical instruments, the selling price of which exceeds $10, but who do not sell pianos or organs, shall be as follows: in counties having a population of 35,000 inhabitants or less, $5; in counties having a population of over 35,000 inhabitants and not exceeding 50,000 inhabitants, $10; in counties having a population of over 50,000 inhabitants and not exceeding 100,000 inhabitants, $15; and in counties having a population of over 100,000 inhabitants, $20.

This shall not be construed to entitle a licensee to maintain branch establishments or stores without payment of the regular license tax of each branch or store, both state and county, required under this section. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 570.)

§ 40-12-142. Pig iron storage operators.

Any person operating yards or enclosures for the purpose of storing pig iron therein and selling warrants thereon or receipts therefor, for each yard or enclosure, shall pay a license tax of $50. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 571.)

§ 40-12-143. Pistols, revolvers, bowie and dirk knives, etc.

Persons dealing in pistols, revolvers, maxim silencers, bowie knives, dirk knives, brass knucks or knucks of like kind, whether principal stock in trade or not shall pay the following license tax: in cities and towns of 35,000 inhabitants and over, $150; and in all other places, $100. All persons dealing in pistols, revolvers and maxim silencers shall be required to keep a permanent record of the sale of every pistol, revolver or maxim silencer, showing the date of sale, serial number or other identification marks, manufacturer's name, caliber and type, and also the name and address of the purchaser, which record shall always be open for inspection by any peace officer of the State of Alabama or any municipality thereof. The failure to keep such record shall subject such person to having his license revoked by the probate judge of the county where such license was issued on motion of any district attorney of the State of Alabama. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 572.)

§ 40-12-144. Playing cards.

In addition to all other taxes of every kind now imposed by law and which are not specifically repealed by this section, every person, firm, corporation, club or association within the State of Alabama which sells or stores or uses or otherwise consumes packages of playing cards containing not more than 54 cards to the deck or package shall pay to the State of Alabama for state purposes only a license or privilege tax of $.10 per package or deck, such tax to be evidenced by revenue stamps, and the stamps in all cases to be affixed to the individual package. The stamps shall be affixed in such manner that their removal will require continued application of water or steam. All taxable playing cards found in the possession of any person, firm, corporation, club or association without having stamps affixed in the manner set out in this section shall be subject to confiscation in the manner provided for contraband goods as set out in Chapter 25 of this title. The administration, collection and enforcement of this law shall be subject to the provisions of Chapter 25 of this title. In addition to the above tax, each retail dealer shall pay for the privilege of selling playing cards an annual license tax of $2. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 573; Acts 1951, No. 978, p. 1653.)

§ 40-12-145. Plumbers, steam fitters, tin shop operators, etc.

Each person doing business as a plumber, steam fitter or operator of a tin shop or roofing shop shall pay the following license tax: in towns or cities of 50,000 inhabitants or over, $25; in cities and towns of 10,000 inhabitants and less than 50,000 inhabitants, $15; in cities and towns of less than 10,000 inhabitants, $10; and in all

other places, whether incorporated or not, $5. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 574.)

§ 40-12-146. Pool tables.

For each pool table upon which the game of pin pool, bottle pool or starboard pool, or other like device is played, there shall be paid a license tax of $100. For each table upon which the game of pool or billiards is played with 15 balls or more or less, and not pin pool, there shall be paid a license tax of $25. The provisions of this section shall not apply to pool or billiard tables operated or owned by private individuals and used in their homes or pool or billiard tables operated or owned by private clubs, social clubs, or Y. M. C. A.'s when no charge is made for playing thereon. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 575.)

§ 40-12-147. Racetracks, athletic fields, etc.

Each owner or lessee of an athletic field, racetrack or place where races of any kind are held, or where admission fees charged are in excess of $.50, shall pay the following license taxes: in cities or towns of less than 10,000 inhabitants, or within five miles thereof, $10; in cities or towns of 10,000 and less than 25,000 inhabitants, or within five miles thereof, $25; in cities of 25,000 inhabitants and less than 50,000 inhabitants, or within five miles thereof, $50; and in cities of 50,000 inhabitants or more, or within five miles thereof, $100. This section shall not apply to racetracks used exclusively by any county or state fair or athletic fields owned or maintained in good faith by educational institutions located in this state. The provisions of this title permitting the payment of a half-year license tax after April 1 shall not apply to this section. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 577.)

§ 40-12-148. Radios.

Every person engaged in the business of selling radios or other receiving or transmitting machines shall pay the following annual privilege tax: in cities of over 50,000 inhabitants, $25; in cities of over 15,000 inhabitants and not exceeding 50,000 inhabitants, $15; in cities and towns of over 5,000 inhabitants and not exceeding 15,000 inhabitants, $10; in cities or towns of over 1,000 inhabitants and not exceeding 5,000 inhabitants, $5; and in all other places, whether incorporated or not, $3. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 578.)

§ 40-12-149. Real estate brokers and agents — Realty situated within state.

Each person engaged in buying, selling or renting real estate on commission, when such real estate is situated in this state, shall pay to the state the following license tax: in cities and towns of 10,000 inhabitants and over, $15; in cities and towns of less than 10,000 and more than 5,000 inhabitants, $10; and in all other places, $5. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 580.)

§ 40-12-150. Real estate brokers and agents — Realty situated without the state.

Every person who shall sell or who shall offer to sell in this state any lots or land situated in another state, or who offers to sell at auction or advertises any auction sale of town lots, or the sale by auction or otherwise, or lots in any subdivision of lands situated in another state shall pay an annual license tax to the state of $500. Before any license shall be issued under this section, the party desiring to obtain such license shall cause to be recorded at his own expense on the deed records in the office of the probate judge of the county in which the license is applied for a full description of the lands or lots so offered

for sale, together with the location of same and, if the lands have been divided into lots shall, at his own expense, file a map of said subdivision, which shall be recorded upon the plat book of the county in the office of the judge of probate, and reference to said plat book shall be made on the deed records and noted in the general direct and reverse index of said county. The applicant shall also file and cause to be recorded at his own expense, in the office of the probate judge, evidence of the ownership of the vendor of said lands or lots, the character and extent of such ownership, together with a statement of any and all mortgages or other liens which may exist thereon. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 581.)

§ 40-12-151. Restaurants, cafes, cafeterias, etc.

Each restaurant, cafe, cafeteria, lunch counter or public eating house where meals, food or refreshments are furnished or served and charged for shall pay the following license taxes:

(1) In cities of over 40,000 inhabitants: where the seating capacity does not exceed 10 people, $10; where the seating capacity is over 10 people and does not exceed 20 people, $15; where the seating capacity is over 20 people and not exceeding 35, $30; where the seating capacity is over 35 people, $50.

(2) In cities of 15,000 and not over 40,000 inhabitants: where the seating capacity does not exceed 10 people, $7.50; where the seating capacity is over 10 people and does not exceed 20 people, $12.50; where the seating capacity is over 20 people and not exceeding 35, $25; where the seating capacity is over 35 people, $35.

(3) In cities or towns of over 5,000 and less than 15,000 inhabitants: where the seating capacity

does not exceed 10 people, $5; where the seating capacity is over 10 people and does not exceed 20 people, $10; where the seating capacity is over 20 people and not exceeding 35, $15; where the seating capacity is over 35 people, $25.

(4) In all other places of 5,000 inhabitants and under, whether incorporated or not: where the seating capacity does not exceed 10 people, $5; where the seating capacity is over 10 people and does not exceed 20 people, $7.50; where the seating capacity is over 20 people and not exceeding 35, $10; where the seating capacity is over 35 people, $15.

Seating capacity shall be computed as of October 1; provided, that if a restaurant, cafe, cafeteria, lunch counter or other public eating house should increase its seating capacity after paying the license tax as above provided before January 1, next, it shall be liable for additional tax based on the above schedule; should the seating capacity be increased after January 1 and before April 1, it shall be liable for an additional tax based on the acquired number of seats, but shall be taxed only for three fourths of the additional tax; should the seating capacity be increased after April 1, it shall be liable for one half of the additional tax based on the then acquired seating capacity. The foregoing schedule shall not apply to regular druggists or operators of ice cream parlors paying a soda fountain license and who serve sandwiches, but do not serve meals or lunches, nor to employers operating on their own premises nonprofit restaurants or lunchrooms for the service of meals and lunches to their employees. Hotels operating two restaurants or dining rooms, in connection with the hotel and under the same ownership or management, shall compute their seating capacity on the combined seats of both restaurants or dining rooms and shall be required to secure only one

license. The provisions hereof shall not apply to restaurants, cafes, cafeterias or lunch counters operated in connection with, by or as a part of any school, college or university. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 582.)

§ 40-12-152. Roadhouses, nightclubs, etc.

Every place commonly known as a roadhouse, nightclub, public dance hall or place by any other name where the general public is permitted to dance, whether or not a charge is made therefor, within incorporated cities or towns or within the police jurisdiction thereof, shall pay a license tax of $25; and in all other places $50. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 583.)

§ 40-12-153. Sandwich shops, barbecue stands, etc.

Each sandwich shop, barbecue stand or pit, hamburger or hot dog stand shall pay an annual license tax of $5. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 584.)

§ 40-12-154. Sawmills, heading mills or stave mills.

Each person, firm or corporation engaged in operating a sawmill, heading mill or stave mill shall pay a privilege tax according to capacity as follows: those having a capacity of 5,000 feet or less per day, $10; those having a capacity of more than 5,000 and not exceeding 10,000 feet per day, $25; those having a capacity of more than 10,000 and not exceeding 25,000 feet per day, $50; those having a capacity of more than 25,000 feet and not exceeding 50,000 feet per day, $100; those having a capacity of more than 50,000 feet per day and not over 100,000, $200; those having a capacity of 100,000 and not over 150,000, $300; those having a capacity of more than 150,000 and not more than 200,000, $400; and those hav-

ing a capacity of more than 200,000 feet, $500. Only one state license shall be paid by the operator or owner of any sawmill. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 585; Acts 1945, No. 311, p. 503.)

§ 40-12-155. Scientists, naturopaths and chiropodists.

Each scientist, naturopath or chiropodist practicing his profession shall pay an annual license tax of $10 to the state, but no license tax shall be paid to the county. If such business is conducted as a firm or corporation in which more than one person is engaged, each scientist, naturopath or chiropodist so engaged shall pay a license tax of $10; provided further, that no scientist, naturopath or chiropodist shall be required to pay a license tax until after he has practiced his profession for two years. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 586.)

§ 40-12-156.Sewing machines.

Each person selling or delivering sewing machines, either in person or through agents, shall pay $25 annually to the state for each county in which he may sell or deliver sewing machines. For each motor vehicle used in delivering or displaying the same, an additional license shall be paid to the state of $10; provided, that a merchant carrying sewing machines as a part of his stock in trade and whose principal business is not selling sewing machines shall not be required to pay this license. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 587.)

§ 40-12-157.Shooting galleries.

Each person operating a shooting gallery shall pay an annual license tax of $20, but such license may be taken out for one month, in which case the license tax shall be $5 per month. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 588.)

§ 40-12-158. Shotguns, rifles, ammunition, etc.

(a) Each person dealing in shotguns, rifles of .22 calibre or over, metallic ammunition or shotgun shells shall pay a license tax of $25 in cities of 100,000 inhabitants or over; $10 in cities or towns of 7,000 and less than 100,000 inhabitants; and $3 in all other places, whether incorporated or not.

(b) Regularly licensed rolling stores selling any or all of the articles enumerated in this section shall, in addition to the license provided in Section 40-12-174, pay a license tax of $5 to the state and $5 to the county in each county in which they sell or offer such articles for sale. (Acts 1935, No. 194, p. 256; Acts 1936-37, Ex. Sess., No. 214, p. 248; Code 1940, T. 51, § 589; Acts 1943, No. 474, p. 438.)

§ 40-12-159. Skating rinks.

Each skating rink operator shall pay an annual state license tax of $25 and a county license tax of $5 for every county in which same is operated or conducted. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 590.)

§ 40-12-160. Soliciting brokers.

Any person engaged in the management of business matters occurring between the owners of vessels, railroads, airplanes, motor vehicles and express companies and the shippers or consignors of the freight and the passengers which they carry shall be deemed a "soliciting broker" for the purpose of this section. Every such person shall pay, for the privilege of transacting such business, $50. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 593.)

§ 40-12-161. Spectacles or eyeglasses.

Each person selling spectacles or eyeglasses, other than nonprescription sunglasses, shall pay the following license tax: in cities or towns of 50,000 inhabitants and over, $25; in cities or towns of 15,000 inhabitants and less than 50,000 inhabitants, $15; in cities and towns of over 5,000 inhabitants and less than 15,000 inhabitants, $10; and in all other places, whether incorporated or not, $5. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 594.)

§ 40-12-162. Stock and bond brokers.

Each person dealing in stocks and bonds shall pay a license tax of $50. The payment of the license tax required by this section shall authorize the doing of business in the town, city or county where paid. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 596.)

§ 40-12-163. Street fairs and carnivals.

Each person operating or conducting an exhibition termed a "street fair" or "carnival" shall pay to the state a license tax as follows: for an exhibition operating or composed of or controlling or embracing not more than 10 exhibits, devices or concessions, $50; but where more than 10 and not exceeding 20 exhibits, devices or concessions, $75; and where more than 20 and not exceeding 35, $100; and where more than 35 exhibits, devices or concessions, $150. This license shall entitle the street fair or carnival to be operated for a period of not exceeding two weeks in any one place at any one time. For the purpose of this section, a "street fair" or "carnival" shall mean a combination of exhibitions, also called sideshows, rides, games of chance, tests of skill or strength, concessions and any other devices generally associated with a "street fair" or "carnival," regardless of ownership, when operated as a combination or a group, and regardless of whether or not an admission is charged to the midway or grounds. A licensee under this section shall not be required to purchase licenses under the provisions of Sections 40-12-69, 40-12-95, 40-12-103, 40-12-140, 40-12-153 and 40-12-157. (Acts 1935, No. 194, p. 256; Acts 1939, No. 391, p. 515; Code 1940, T. 51, § 597; Acts 1967, No. 422, p. 1088.)

§ 40-12-164. Supply cars.

The owner, conductor or person in charge of every supply car or cars from which any goods, wares or merchandise are sold, whether to servants of the railroad company or to others, must pay a license tax of $100; and the person so licensed shall thereby be entitled to carry on such business in the car therein named in any county in which such car is run or drawn; upon payment of an additional license tax of $5 in each county where goods are sold. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 598.)

§ 40-12-165. Syrup and sugar factories.

Each person operating or conducting a factory, plant or refinery where syrup or sugar is made, manufactured or refined shall pay a license tax based on the capital invested in plant, equipment, finished materials and raw materials, as follows: where the capital so invested is over $100,000, $100; where the capital so invested is over $75,000 and not exceeding $100,000, $75; where the capital so invested is over $50,000 and not exceeding $75,000, $50; where the capital so invested is over $25,000 and not exceeding $50,000, $40; where the capital so invested is over $10,000 and not exceeding $25,000, $25; where the capital so invested is over $5,000 and not exceeding $10,000, $15; where the capital so invested is over $2,000 and not exceeding $5,000, $10;

and where the capital so invested is over $1,000 and not exceeding $2,000, $5. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 599.)

§ 40-12-166. Theaters, vaudeville and variety shows.

Each person engaged in conducting a theater, vaudeville or variety show and each person conducting any other exhibition, show, entertainment or performance to which an admission is charged and not in this chapter otherwise licensed shall pay an annual license tax for each place of business as follows: in towns and cities of 3,000 inhabitants or less and in unincorporated places, $5; in cities of more than 3,000 and less than 7,000 inhabitants, $10; in cities of 7,000 and less than 20,000 inhabitants, $20; in cities of 20,000 and less than 30,000 inhabitants, $25; and in cities of 30,000 inhabitants or more, $35. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 601.)

§ 40-12-167. Ticket scalpers.

Any person offering for sale or selling tickets at a price greater than the original price and who is commonly known as a ticket scalper shall pay a license tax of $100. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 602.)

§ 40-12-168. Tourist camps.

Each person operating a public tourist camp where transient guests are lodged for pay shall be deemed for the purpose of this section engaged in the business of keeping or operating a tourist camp and shall pay the following license or privilege tax: each camp containing not over five beds, $15; each camp containing over five and not exceeding 15 beds, $25; each camp containing over 15 beds, $35 and $1 for each additional bed over 15. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 604.)

§ 40-12-169. Tractors, road machinery and trailers.

Each person, other than a licensee under Section 40-12-51, for engaging in the business of dealing in tractors, road machinery or trailers, shall pay the following license tax: in cities and towns of 50,000 inhabitants or over, state license of $50, county license of $40; in cities and towns of 25,000 and less than 50,000 inhabitants, state license of $35, county license of $35; in cities and towns of 5,000 and less than 25,000 inhabitants, state license of $20, county license of $20; and in all other places of less than 5,000 inhabitants, whether incorporated or not, state license of $10, county license of $10. (Acts 1935, No. 194, p. 256; Acts 1936-37, Ex. Sess., No. 156, p. 178; Code 1940, T. 51, § 605; Acts 1947, No. 133, p. 42.)

§ 40-12-170. Trading stamps.

Every person who engages in or carries on the business of issuing or selling to merchants trading stamps, or any device or substitute thereof, or any stamps or certificates of like character which are to be given by merchants to purchasers of goods, wares or merchandise and which said stamps, certificates or devices, or substitutes therefor the person issuing or selling the same agrees to accept in payment for goods, wares, and merchandise kept on hand by himself or another for redemption or for distribution by the person issuing or selling such stamps or certificates, shall pay to the State of Alabama a privilege or license tax of $500 per annum, such funds to go to the State of Alabama exclusively and, in lieu of any and all other county licenses, the sum of $250 to each county, for each place of business, per annum. The provisions of this section shall not apply to any coupon, ticket, certificate, card or other similar device issued or distributed by a manufacturer or packer which is redeemable for any goods, wares or merchandise by the manufacturer or

packer or its agents or independent contractor acting for redemption. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 606; Acts 1955, No. 399, p. 938; Acts 1969, No. 1157, p. 2162.)

§ 40-12-171. Transfer of freight.

Each person transferring freight, not including household goods, using more than one vehicle for hire in cities or towns or in the police jurisdiction thereof shall pay a license tax of $10 for each vehicle in excess of one. This section shall not apply to vehicles owned by motor carriers coming within the provisions of Sections 37-3-1 through 37-3-34 and 40-19-1 through 40-19-17 nor shall it apply to vehicles owned by any railroad company or express company. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 607; Acts 1949, No. 606, p. 938.)

§ 40-12-172. Transient dealers.

Each person doing business as a transient dealer as defined in this section and who does not pay the privilege license under Section 40-12-73 or the license permit under Section 40-25-19 shall pay an annual license tax to the state of $30 The payment of one state license shall authorize such transient dealer to engage in such business in any county in the state upon the payment of a county license of $5 in each such county.

When used in this section, the words "transient dealer" shall be held to include any person or persons who shall be embraced in any of the following classifications: all persons acting for themselves or as an agent, employee, salesman or in any capacity for another, whether as owner, bailee or other custodian of goods, wares and merchandise and going from person to person, dealer to dealer, house to house or place to place and selling or offering to sell, exchanging or offering to exchange, for

resale by a retailer, any goods, wares and merchandise, or all persons who do not keep a regular place of business open at all times in regular business hours and at the same place, who shall sell or offer for sale goods, wares and merchandise, or all persons who keep a regular place of business open during regular business hours and at the same place, who shall elsewhere than at such regular place of business sell or offer for sale or at the time of such sale deliver goods, wares or merchandise, or all persons who go from person to person, house to house, place to place or dealer to dealer and sell or offer for sale or exchange the goods, wares and merchandise which they carry with them, and who deliver the same at the time of, or immediately after the sale, or without returning to the place of business operations (a permanent place of business) between the taking of the order and the delivery of the goods, wares and merchandise, or all persons who go from person to person, house to house, place to place or dealer to dealer soliciting orders by exhibiting samples or taking orders, and thereafter making delivery of the goods or filling the order without carrying or sending the order to the permanent place of business and thereafter making delivery of the goods pursuant to the terms of the order, or all persons who go from person to person, place to place, house to house or dealer to dealer carrying samples and selling goods from samples and afterwards making delivery without taking or sending an order therefor to a permanent place of business for the filling of the order and delivery of the goods, or the exchange of the goods, or the exchange of merchandise having become damaged or unsalable, or the purchase by merchants of advertising space, or all persons who have in their possession or under their control any tangible property offered or to be offered for sale, or to be delivered, unless the sale or delivery thereof is to be made in pursuance of a bona fide order for the goods to

be sold or delivered, said order to be evidenced by an invoice or memorandum.

An order is defined as being an agreement in writing between the seller to deliver and the buyer to accept the merchandise to be sold, bought and delivered at the prices and in the quantities agreed upon; and said order shall be evidenced by a memorandum or invoice accompanying the goods on the day on which the same are to be delivered, specifically designating and specifying the name and address of the seller and the buyer, the items purchased, sold and to be delivered and the price on each and the aggregate thereof. The agreement to buy or accept for delivery must be entered into before the goods are placed in transit or delivered and must be transmitted from the place at which taken to the regular and fixed place of business before being filled and the goods delivered. A commonly termed "blanket order" shall not satisfy the conditions of this definition when such "blanket order" is merely an agreement between the buyer and seller, whereby the buyer shall take such quantity of goods as the seller may deliver to his place of business, or to any other place, within a certain period of time. A "blanket order" to satisfy the conditions of this definition must be an agreement in writing and must recite that the buyer agrees to accept from the seller definite quantities of goods at agreed prices or at prevailing market prices at the time of the delivery of the same; and such agreement shall not be subject to change or cancellation before its termination, without damages to either of the parties entering into it, and it shall not be a condition of such agreement that goods, delivered in accordance therewith must be paid for on delivery.

This section shall not apply to transient dealers of bakery products in the county where such bakery is located; nor shall this section apply to transient dealers of bottled soft drinks when sold or distributed from a bot-

tling plant which has paid the privilege tax imposed by Section 40-12-65; nor shall it apply to transient dealers in the sale or delivery of gasoline, kerosene, lubricating oil or other petroleum products when drawn, conveyed and distributed from a stock maintained at a warehouse, oil depot, distributing station or established place of business in this state upon which has been paid all the privilege taxes required of such business; provided that transient dealers of bakery products engaging in the business of transient dealer in any other county shall pay the state an annual state license tax of $20 and, in addition thereto, $5 to each county in which such transient dealer does business as such. This section shall not apply to a person or to any member of his immediate household selling dairy, poultry or farm products raised, produced or grown by him nor to such products preserved, bottled or canned by him. Nor shall this section apply to those selling fish, shrimp, crabs or other seafoods, candy and peanuts.

No part of this section shall be construed so as to impose any tax or require any duty of traveling salesmen representing jobbers or wholesalers and who do not carry with them goods for sale, but only take orders for goods and deliver said orders to their employer at a store or permanent place of business, to be filled in the manner used by the jobbing and wholesale trade.

The payment of the privilege license tax required by this section shall not authorize any transient dealer to sell any goods, wares or merchandise for which a higher license is required without the payment of the higher license.

Any person paying the license tax herein levied shall not sell any goods, wares or merchandise for use or consumption by going from person to person, dealer to dealer, house to house or place to place without the pay-

ment of a peddler's license as required by Section 40-12-174.

The taxes herein levied are not subject to any specific exemption. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 609.)

§ 40-12-173. Transient theatrical and vaudeville shows.

Each person operating or conducting vaudeville or theatrical shows as transient, operating temporarily in different places in tents or otherwise, shall pay to the state a license tax of $25 per week for such show. A separate license shall betaken out for each week of operation. No county in collecting said license for said county shall charge a license, except for the number of days said shows operate in said county, and that license shall be in proportion that the days shown in said county bears to the weekly license. This section shall not apply to any show operating in a theater regularly licensed. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 610.)

§ 40-12-174. Transient vendors and peddlers.

(a) Each person travelling on an animal or using a vehicle other than a motor vehicle, doing business as a transient vendor or peddler as defined in this section, displaying, selling or offering to sell any goods, wares or merchandise, other than to a merchant for resale, shall pay a privilege license tax to the State of Alabama of $15 and $5 for the county in each county in which such transient vendor or peddler does business for each vehicle.

(b) Each itinerant vendor or peddler of merchandise, other than tobacco products, medicines or household remedies or liquefied petroleum products, but including persons, firms, corporations, partnerships or cooperatives whose principal business is selling and distributing milk and dairy products, who operates on foot or

uses a vehicle solely for the purpose of transporting merchandise from house to house or place to place but who does not use such vehicle for the display of merchandise or as a rolling store and who does not permit purchasers to enter said vehicle for the purpose of purchasing merchandise shall pay an annual license tax of $20 to the state and $10 to the county in each county in which he does business; and the payment of one state license shall authorize such persons, firms, corporations, partnerships or cooperatives to engage in such business in any county in the state upon the payment of a county license of $10 to each county in which said persons, firms, corporations, partnerships or cooperatives do business.

(c) Each person using a motor vehicle, doing business as a transient vendor or peddler as defined in this section displaying, selling or offering to sell any goods, wares or merchandise of whatever nature at retail shall pay to the state in order to engage in such business the following license taxes: upon one motor vehicle, the annual license for each such motor vehicle, not in excess of one so used, shall be $100; upon two motor vehicles or more, but not to exceed three, the annual license fee for each such additional motor vehicle shall be $130; upon more than three motor vehicles, but not to exceed six, the annual license fee for each such additional motor vehicle shall be $150; upon each motor vehicle in excess of six, for each such additional motor vehicle, $200. In addition to the above, there is levied a license tax of $50 for the state and a county license tax of $50 in each additional county in which said business is conducted. Rolling stores which are controlled or held with others by stock ownership of 25 percent or ultimately controlled or directed by one management or association of ultimate management shall be deemed for the purpose of this section as being owned by the same person.

(d) Each person going from person to person, place to place, town to town, selling or giving away medicine, salves, ointments, lotions or other goods, wares or merchandise by exhibitions, shows, performances or other entertainment, whether sold for himself or another, in each county where such sales or gifts are made shall pay a license tax of $100.

(e) When used in this section, the words "transient vendor or peddler" shall be held to include any person embraced in any of the following classifications:

(1) All persons commonly and generally termed "peddlers" and falling within the usual and commonly understood definition of "peddler"; or

(2) All persons acting for themselves or as an agent, employee or salesman, or in any capacity for another whether as owner, bailee or other custodian of goods, wares and merchandise, going from person to person, house to house or place to place and selling or offering to sell, or consigning or offering to consign, other than to a retail merchant for resale, goods, wares and merchandise; or

(3) All persons who do not keep a regular place of business open at all times in regular business hours at the same place, going from person to person, house to house, place to place or town to town and selling or offering for sale, other than to a retail merchant, goods, wares and merchandise which they carry with them and who deliver the same at the time of or immediately after the sale; or

(4) All persons who go from person to person, house to house, place to place, soliciting orders, other than from a retail merchant for resale, by exhibiting samples or taking orders and thereafter making delivery of the goods or filling the order, without carrying or sending the order to the permanent place of business.

(f) This section shall not apply to a person or to any member of his immediate household selling or offering to sell dairy, poultry or farm products raised, produced or grown by himself, or the immediate members of his household, or such products preserved, bottled or canned by himself, or the immediate members of his household, or to persons peddling wood, charcoal, fruit or vegetables; or to blind persons or persons physically disabled to the extent of 30 percent, such disability to be certified to by a reputable physician and the local license inspector, operating other than a rolling store, or to peddlers of poultry and eggs, or to persons selling fish, shrimp, crabs or other seafoods. These and none other shall be exempt from the payment of the license tax levied by this section.

(g) The payment of the privilege license tax required by this section shall not authorize any transient vendor or peddler to sell any goods, wares or merchandise for which a higher or specific license is required without the payment of such license in addition to the license herein levied or to sell any goods, wares or merchandise that are by law required to be sold at a fixed location, except upon the payment of the maximum license tax levied under the section or sections of this chapter for the sale of merchandise at a fixed location. This section shall not apply to transient dealers of bottled soft drinks when sold or distributed from a bottling plant which has paid the privilege license tax imposed by Section 40-12-65. (Acts 1935, No. 194, p.256; Acts 1936-37, Ex. Sess., No. 230, p. 277; Code 1940, T. 51, § 611; Acts 1953, No. 208, p. 276; Acts 1961, Ex. Sess., No. 241, p. 2254; Acts 1969, No. 543, p. 1021.)

§ 40-12-175. Turpentine and resin stills.

Each person operating a turpentine still or stills for the purpose of distilling or manufacturing spirits of turpen-

tine or resin shall pay an annual privilege tax as follows: on each such still having a capacity of 16 barrels or less, $20; on each still having a capacity of over 16 barrels and not over 20 barrels, $35; on each still having a capacity of over 20 barrels and not over 25 barrels, $45; and on each still having a capacity of 25 barrels or over, $65. Each owner or operator of a turpentine still shall, between October 1 and November 1 of each year, file with the probate judge of each county in which he does business a sworn statement, showing the number of stills operated by him in such county for any period of the preceding year and the capacity of each still operated, and shall pay the license tax required by the foregoing schedule in each county, which license tax shall be based on such previous year's capacity; provided, that no county license tax shall be paid. Any person who makes or files a false statement as to the number of stills operated or as to the capacity of such still or stills shall be guilty of perjury and, on conviction, shall be punished as in other cases of conviction for perjury as provided by law. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 612.)

§ 40-12-176. Vending machines.

(a) Every person, firm, corporation, association or copartnership operating a vending machine business whereby tangible personal property is sold through or by the use of coin-operated machines shall pay an annual privilege license tax based on the total sales of each such vending company during the preceding year as follows:

Total Sales	Amount of Tax
$12,000.00 or less	$10.00
12,000.01— 24,000.00	20.00
24,000.01— 36,000.00	30.00
36,000.01— 48,000.00	40.00
48,000.01— 60,000.00	60.00
60,000.01— 80,000.00	75.00

80,000.01— 100,000.00	90.00
100,000.01— 150,000.00	125.00
150,000.01— 200,000.00	150.00
200,000.01— 250,000.00	175.00
250,000.01— 350,000.00	200.00
350,000.01— 450,000.00	300.00
450,000.01— 750,000.00	400.00
750,000.01— 1,000,000.00	500.00
1,000,000.01— 2,500,000.00	600.00
2,500,000.01— 5,000,000.00	700.00
5,000,000.01— 7,500,000.00	800.00
7,500,000.01— 10,000,000.00	900.00
10,000,000.01 or more	1000.00

(b) The revenue produced by the license taxes levied in this section shall be divided equally between the state and the several counties in which it is collected. No separate county license shall be required. The several probate judges and license commissioners shall report and remit monthly to the state treasurer all moneys collected for the use of the state, and to the counties all moneys collected for the counties. The payment of such occupational license tax as herein provided for in one county in the state shall be sufficient, and the vending machine company shall conspicuously post, on each machine operated by him under such license, his name and address.

(c) Hotels, motels, tourist camps or other places of business having less than five coin-operated radios shall pay $8 for each location, establishment or place of business receiving transmitted music by wire or cable; except, that such locations, establishments or places of business having less than five transmitters or speakers, $8 for each such transmitter or speaker in excess of four, $2 each; provided, that where the music transmitted by wire or cable from any central point or studio, whether such point or studio is situated within or without such location, establishment or place of business, is not coin-oper-

ated or where no deposit of a coin or other thing of value into any machine is necessary in order that music may be heard, then each person, firm or corporation engaged in the business of transmitting music by wire or cable may pay in lieu of the speaker or transmitter tax specified above a privilege tax as follows: in counties of 60,000 inhabitants or less, $30; in counties of 60,001 and not exceeding 125,000 inhabitants, $60; in counties of 125,001 inhabitants and over, $80; provided, that one license may be issued to include all coin-operated radios and/or transmitters or speakers located within such hotel, motel, tourist camp location, establishment or other place of business, which license shall be prominently displayed. The licenses herein provided for shall be levied upon the operator of the machine, the coin-operated radio or the central point or studio from which point or studio the music is transmitted; provided, that in the event any unlicensed machine, coin-operated radio, transmitter or speaker is found in any establishment or place of business, the operator of such establishment or place of business shall be the operator of such machine, coin-operated radio, transmitter or speaker and shall be liable for the license therefor.

(d) Nothing in this section shall apply to machines installed by any person, firm or corporation, nor to coin-operated gas meters, nor to coin-operated telephones, nor to a machine vending postage stamps in its place of business or vending necessary articles on a nonprofit basis for emergency use only by the employees of such person, firm or corporation.

(e) No license shall be required under this section where a privilege or dealer's license is required by this chapter for the sale of such article, and such privilege license shall have been obtained by the person, firm or corporation operating the place of business where such machine is located, or the owner of such vending machine shall have secured such privilege license as required herein.

(f) Any person operating or permitting the operation of a vending machine dispensing packages or in quantities less than a package of cigarettes, or any article on which there is an excise tax, the payment of which is evidenced by stamps, without first having paid the tax thereon by affixing the required stamps to the original package as required under Section 40-25-2, shall be guilty of a misdemeanor and punished as provided in such section for failure to pay said tax. Each vending machine vending tobacco products of any kind whatsoever shall have securely affixed thereto in full view the name and address of the legal owner of said machine. When tobacco products are found in such vending machines to be improperly stamped or unstamped, in violation of Section 40-25-2, such vending machine and contents shall be confiscated by any duly authorized agent of the Department of Revenue as provided in Section 40-25-2 for the confiscation of improperly stamped or unstamped tobacco products. Each vending machine vending tobacco products of any kind whatsoever shall have a transparent front window, or windows, through which the Alabama revenue stamps required by Section 40-25-2 may be seen without the necessity of opening or unlocking the vending machine.

(g) For the purpose of any excise or consumption taxes, the payment of which is not evidenced by stamps, levied on any of the articles dispensed through such machine, the person in whose place of business each machine is located shall be considered the consumer of such article and shall be liable for such taxes measured by the regular retail price thereof.

(h) No license shall be required under this section for home-type merchandise vending machines placed in private homes for home use only and not for public use.

(i) Nothing herein contained shall be construed as legalizing or licensing any machine or device which is now illegal or which may hereafter be declared illegal.

(j) All the licenses levied by this section shall bear the business address of the owner or operator thereof.

(k) It is the legislative intent that only the license required under this section shall be required for the operation of a vending machine company under this section within this state for any one license year.

(l) The license shall be purchased in the county in which the home office or principal place of business of the company is located or in operation on October 1 or at the time the license is purchased for the licensing year.

(m) Any person failing to perform any of the duties required of him by the provisions of this section shall be guilty of a misdemeanor and, upon conviction, shall be fined not less than $10 and not exceeding $100 for each offense.

(n) In the event that a new business is formed which has not heretofore been in the vending machine business, it shall pay only the minimum license until such time as a new license is required.

(o) Each applicant for any license required herein shall by sworn statement supply the gross sales as required herein, and its books and records shall be available to any taxing authority within this state for inspection to insure compliance with this section.

(p) On all other vending machines whereby tangible personal property is not sold but services or amusements are vended, with the exception that coin-operated pool tables and coin-operated or self-service laundries are specifically excluded herefrom and licensed under other sections, operators shall pay a license as follows: on all machines whereby one cent is used, a fee of $1; on all machines where over one cent is used, a fee of $8. The license is to be paid, collected and distributed as heretofore provided in this section. It is further provided that any fees, penalties, fines or other collections made by the Revenue Department upon owners of coin-operated or self-service laundries prior to the date of this amendatory act shall be returned in full to such owners. (Acts 1935, No. 194, p. 256; Acts 1936-37, Ex. Sess., No. 36, p. 32; Acts 1939, No. 398, p. 519; Code 1940, T. 51, § 613; Acts 1943, No. 207, p. 185; Acts 1947, No. 688, p. 522; Acts 1957, No. 566, p. 785; Acts 1961, No. 867, p. 1358, Acts 1961, Ex. Sess., No. 38, p. 1890; Acts 1963, No. 483, p. 1035; Acts 1965, 2nd Ex. Sess., No. 46, p. 65; Acts 1975, No. 1085; p. 2149; Acts 1983, 3rd Ex. Sess., No. 83-835, p. 55.)

§ 40-12-177. Veneer mills, planing mills, box factories, etc.

Each person, firm or corporation engaged in the operation of a veneer mill, planing mill, box factory, handle factory or any other factory where lumber or timber is sawed or made into a finished or semifinished product, other than a sawmill licensed under Section 40-12-154, shall pay a privilege tax based on the number of men employed or engaged in the manufacture of the products produced by such mills, as follows: where there are five or less men employed or so engaged, $5; where there are more than five men and less than 10 so employed or engaged, $10; where there are 10 men and less than 20 so employed or engaged, $30; where there are 20 men and less than 40 so employed or engaged, $80; and where there are 40 men and over, $120. It is the intention hereof that where a person, firm or corporation shall pay a privilege tax under Section 40-12-154 or under Section 40-12-121, then no privilege license tax shall be charged or collected hereunder. (Acts 1936-37, Ex. Sess., No. 231, p. 279; Code 1940, T. 51, § 614.)

§ 40-12-178. Veterinary surgery.

Each person practicing veterinary surgery shall pay an annual license tax of $5 to the state, but no license tax shall be paid to the county. No veterinary surgeon shall be required to pay a license tax until he has practiced his profession for two years. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 615.)

§ 40-12-179. Warehouses and yards.

Each person operating a warehouse or yard for the storage of goods, wares or merchandise for hire shall pay an annual license tax to the state of $25; where such warehouseman also acts as a distributing agent and forwards and distributes the goods stored in such warehouse and charges for such service, he shall pay an additional license tax of $100. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 616.)

§ 40-12-180. Waste grease and animal by-products.

Each person engaged in the business of purchasing and receiving or collecting waste grease and animal by-products for rendering or recycling, from businesses, schools and institutions located in various cities of the state, shall pay the following annual license tax in cities of:

over 100,000 population	$50.00
25,000 to 100,000 population	25.00
12,000 to 25,000 population	20.00
6,000 to 12,000 population	15.00
2,000 to 6,000 population	10.00
0 to 2,000 population	5.00

(Acts 1991, No. 91-598, p. 1101, § 1.)

CODE OF ALABAMA 1975

TITLE 40
REVENUE AND TAXATION

CHAPTER 16
FINANCIAL INSTITUTION EXCISE TAX

§ 40-16-1. Definitions.

For the purpose of this chapter, the following terms shall have the respective meanings ascribed to them by this section:

(1) FINANCIAL INSTITUTION. Any person, firm, corporation, and any legal entity whatsoever doing business in this state as a national banking association, bank, banking association, trust company, industrial, or other loan company or building and loan association, and such term shall likewise include any other institution or person employing moneyed capital coming into competition with the business of national banks, and shall apply to such person or institution regardless of what business form and whether or not incorporated, whether of issue or not, and by whatsoever authority existing. The common parent corporation of a controlled group of corporations eligible to elect to file a consolidated excise tax return, in accordance with Section 40-16-3, shall be considered a "financial institution" if such parent corporation is a registered bank holding company as defined by the Bank Holding Company Act of 1956, as amended. As a financial institution, the common parent corporation will be governed by Sections 40-16-1 through 40-16-8 and exempt from all income taxes under Sections 40-18-1 through 40-18-85, with the exception that the credit for licenses or taxes as provided by Section 40-16-8 and the regulations issued or promulgated pursuant thereto by the Department of Revenue will not apply to amounts of excise tax on financial institutions imposed hereby and

paid by such parent corporation. "Financial institution" shall not mean or include individual citizens and fiduciaries acting in a representative capacity for individual citizens, not engaged in a banking, loan, investment, or similar business, but merely making personal investments of personal or fiduciary funds in bonds, notes or other evidences of indebtedness and not made in competition with the business of national banks, nor shall such term apply to insurance companies or insurance associations merely making investments of reserves in bonds, notes or other evidences of indebtedness and not made in competition with the business of national banks.

(2) NET INCOME. The net income for the taxable year, as in this title defined, arising from the business the privilege to engage in which is hereby taxed, computed by deducting from the gross income arising from such business, without any exclusions from or credit to such gross income, the total amount of the following deductions:

a. All the ordinary and necessary expenses paid or incurred during the year the income is received which is made the basis of the tax in carrying on the business, the privilege to engage in which is hereby taxed, including a reasonable allowance for salaries or other compensation for personal service actually rendered; also all contributions paid by a financial institution as employer to or under a stock bonus, pension, profit-sharing, or annuity plan, or if compensation is paid or accrued on account of any employee of any financial institution under the plan deferring the receipt of such compensation, such contributions or compensation shall be deductible, but only to the following extent:

1. In the taxable year when paid, if the contributions are paid into a pension trust and if such taxable year ends within or with a taxable year of

the trust for which the trust is exempt under Section 40-18-25 in an amount determined as follows: (i) An amount not in excess of five percent of the compensation otherwise paid or accrued during the taxable year to all the employees under the trust, but such amount may be reduced for future years if found by the Commissioner of Revenue upon periodical examinations at not less than five year intervals to be more than the amount reasonably necessary to provide the remaining unfunded cost of past and current service credits of all employees under the plan, plus (ii) any excess over the amount allowable under clause (i) necessary to provide with respect to all of the employees under the trust the remaining unfunded cost of their past and current service credits distributed as a level amount, or a level percentage of compensation, over the remaining future service of each such employee, as determined under regulations prescribed by the Commissioner of Revenue, but if such remaining unfunded cost with respect to any three individuals is more than 50 percent of such remaining unfunded cost, the amount of such unfunded cost attributable to such individuals shall be distributed over a period of at least five taxable years, or (iii) in lieu of the amounts allowable under (i) and (ii) above, an amount equal to the normal cost of the plan, as determined under regulations prescribed by the Commissioner of Revenue plus, if past service or other supplementary pension or annuity credits are provided by the plan, an amount not in excess of 10 percent of the cost which would be required to completely fund or purchase such pension or annuity credits as of the date when they are included in the plan, as determined under regulations prescribed by the

Commissioner of Revenue; except, that in no case shall a deduction be allowed for any amount (other than the normal cost) paid in after such pension or annuity credits are completely funded or purchased, (iv) any amount paid in a taxable year in excess of the amount deductible in such year under the foregoing limitations shall be deductible in the succeeding taxable years in order of time to the extent of the difference between the amount paid and deductible in each such succeeding year and the maximum amount deductible for such year in accordance with the foregoing limitations.

2. In the taxable year when paid, in an amount determined in accordance with subparagraph 1 of this paragraph, if the contributions are paid toward the purchase of retirement annuities and such purchase is a part of a plan which meets the requirements of subsection (e) of Section 40-18-25, and if refunds of premiums, if any, are applied within the current taxable year or next succeeding taxable year towards the purchase of such retirement annuities.

3. In the taxable year when paid, if the contributions are paid into a stock bonus or profit-sharing trust, and if such taxable year ends within or with a taxable year of the trust with respect to which the trust is exempt under subsection (e) of Section 40-18-25, in an amount not in excess of 15 percent of the compensation otherwise paid or accrued during the taxable year to all employees under the stock bonus or profit-sharing plan. If in any taxable year beginning after the approval of this chapter by the Governor there is paid into the trust, or a similar trust then in effect, amounts less than the amounts deductible under the preceding

sentence, the excess or, if no amount is paid, the amounts deductible shall be carried forward and be deductible when paid in the succeeding taxable years in order of time, but the amount so deductible under this sentence in any such succeeding taxable year shall not exceed 15 percent of the compensation otherwise paid or accrued during such succeeding taxable year to the beneficiaries under the plan. In addition, any amount paid into the trust in a taxable year beginning after the approval of this chapter by the Governor in excess of the amount allowable with respect to such year under the preceding provisions of this subparagraph shall be deductible in the succeeding taxable years in order of time, but the amount so deductible under this sentence in any one such succeeding taxable year together with the amount allowable under the first sentence of this subparagraph shall not exceed 15 percent of the compensation otherwise paid or accrued during such taxable year to the beneficiaries under the plan. The term "stock bonus or profit-sharing trust," as used in this subparagraph, shall not include any trust designed to provide benefits upon retirement and covering a period of years, if under the plan the amounts to be contributed by the employer can be determined actuarially as provided in subparagraph 1. If the contributions are made to two or more stock bonus or profit-sharing trusts, such trusts shall be considered a single trust for the purposes of applying the limitations of this subparagraph.

4. In the taxable year when paid, if the plan is not one included in subparagraphs 1, 2, or 3, if the employees' rights to or derived from such employer's contribution or such compensation

are nonforfeitable at the time the contribution or compensation is paid.

5. For the purposes of subparagraphs 1, 2, and 3, a taxpayer on the accrual basis shall be deemed to have made a payment on the last day of the year of accrual if the payment is on account of such taxable year and is made within 60 days after the close of the taxable year of accrual.

6. If amounts are deductible under subparagraphs 1 and 3, or 2 and 3, or 1, 2, and 3, in connection with the two or more trusts, or one or more trusts and an annuity plan, the total amount deductible in a taxable year under such trusts and plans shall not exceed 25 percent of the compensation otherwise paid or accrued during the taxable year to the persons who are the beneficiaries of the trusts or plans. In addition, any amount paid into such trust or under such annuity plans in any taxable year in excess of the amount allowable with respect to such year under the preceding provisions of this subparagraph shall be deductible in the succeeding taxable years in order of time, but the amount so deductible under this sentence in any one such succeeding taxable year, together with the amount allowable under the first sentence of this subparagraph, shall not exceed 30 percent of the compensation otherwise paid or accrued during such taxable years to the beneficiaries under the trusts or plans. This subparagraph shall not have the effect of reducing the amount otherwise deductible under subparagraphs 1, 2, and 3, if no employee is a beneficiary under more than one trust, or a trust and an annuity plan. If there is no plan but a method of employer contributions or compensation has the effect of a stock bonus, pension, profit-sharing, or

annuity plan, or similar plan deferring the receipt of compensation, this paragraph shall apply as if there were such a plan. Also, all contributions or gifts made by financial institutions to a community chest or to recognized religious, charitable, scientific, or educational institutions or agencies, or to institutions or agencies for the prevention of cruelty to children or animals, which are not operated for profit and no part of the net earnings of which inures to the benefit of any private stockholder or individual or contributions or gifts for vocational rehabilitation authorized by the United States Vocational Rehabilitation Act. The amount of such deduction shall not be, however, in excess of five percent of the financial institution's net income as computed without the benefit of this subsection. Such contributions or gifts shall be allowable as deductions only where made to a community chest or institution or agency recognized as such for the above purposes under rules and regulations prescribed by the Department of Revenue. Traveling expenses, including a reasonable amount expended for meals and lodgings while away from home in the necessary business of such institutions; rentals or other payments required to be made as the condition to the continued use or possession for the purposes of such business, or property to which the taxpayer has not taken or is not taking title or in which the taxpayer has no equity, provided the amount and the reasonableness of all such expenditures shall be approved by the State Department of Revenue.

b. All interest paid or accrued within the taxable year on the indebtedness of said business. Also, all dividends paid or accrued within the taxable year on the shares of preferred stock held or owned by a recon-

struction finance corporation or any other governmental agency;

c. Taxes actually paid within the year in which the income on which the tax is based was received, except the excise tax imposed by this chapter and taxes assessed against local benefits of a kind tending to increase the value of the property assessed;

d. Losses sustained and determined during the taxable year by the business and not compensated for by insurance or otherwise:

1. The basis for determining the amount of any loss or gain shall be the cost to the financial institution of the asset disposed of less the actual depreciation sustained on physical asset and any reduction charged as an expense upon stocks, bonds or other securities in previous years.

2. No loss shall be allowable unless the property is actually disposed of and the loss thereby determined or an appraisal of the loss is made and allowed under the supervision of the Department of Revenue, except as hereinafter provided.

e. Debts ascertained to be worthless and charged off within the taxable year; provided, that a schedule of such debts shall be filed and the reasons supporting such claim for deduction be filed with the return; provided, further, that bad debts shall not include losses on stocks and bonds or a reduction in the market value of such stocks and bonds except where loss is determined by the sale of such securities; provided, that in the case of any financial institution required by law to be examined by state, federal, or federal reserve bank examiners, such debts can be charged off and to such an amount or extent as required to be charged off by state, federal, or federal reserve bank examiners. Any reduction in the book value of any stocks or bonds

carried on the books of any such financial institution required by any state, federal, or federal reserve bank examiners shall be allowed as proper deductions by the State Department of Revenue. On the sale of any securities, the book value of which has been reduced on the requirement of such examiners, and the reduction so made claimed as a deduction, accomplishing a reduction of the tax paid, any excess of the sale price over said book value of such securities shall be reflected as income and subject to the excise tax levied by this chapter. When in the opinion of state, federal or federal reserve bank examiners a debt is recoverable only in part and when a part of such debt is charged off by requirement of state, federal or federal reserve bank examiners, the Department of Revenue shall allow a deduction in an amount equal to the amount of such charge-off;

f. A reasonable allowance for the exhaustion, wear and tear of property used in the business, including a reasonable allowance for obsolescence. The basis for determining the amount of such depreciation deduction shall be the cost of such property, or, if acquired prior to October 15, 1935, the basis shall be the depreciated cost as of October 1, 1935;

g. The amount received as dividends from a corporation organized and existing under the laws of the State of Alabama and the amount received as dividends in liquidation paid from capital;

h. In the discretion of the Department of Revenue, in lieu of such deductions for losses or bad debts, a reasonable addition to reserves therefor and for extraordinary expenses;

i. In the case of savings and loan associations the amount paid out as dividends on the withdrawable shares thereof;

j. In computing the net income of credit unions for the purpose of the excise tax levied by this chapter, there shall, in addition to all other deductions allowed by law, be deducted the amount paid out as dividends on the withdrawable shares of such credit union; and

k. All financial institutions shall be allowed to carry back their net operating losses to apply as a deduction against prior income, and to deduct from succeeding years' income the excess loss, if any, that is not absorbed thereby. For purposes of this subdivision, the term "net operating loss" means the excess of allowable deductions over gross income. No net operating loss deduction (arising out of a net loss in an earlier or later year) shall be allowed in computing a net operating loss. Casualty losses and losses arising from theft, fraud and embezzlement, however, shall be deductible in computing the net operating loss. A net operating loss for a taxable year ending after the year 1952 may be carried back two years, then forward to the eight succeeding taxable years in chronological order; provided, that no part of the net operating loss which has been previously applied against income for one taxable year may be applied as a carryback or carryover to another taxable year. The net operating loss deduction allowed herein shall be the sum of the carrybacks and carryovers applicable to the taxable years. A successor financial institution shall be allowed to carry over and deduct from succeeding years' income, in the manner prescribed herein, the net operating loss of its predecessor. Refunds under the provisions of this subdivision shall be paid from the current year's receipts

3. TAXABLE YEAR. A full period of 12 consecutive months constituting the fiscal year or calendar year of each financial institution ended last prior to April 1, 1935, and thereafter ended last prior to April 1 of each year in which such tax is to be assessed. In the case of any

business hereby taxed conducted only during a fractional period of any year, a return shall be made as herein provided and the tax computed as herein provided, and such tax as assessed shall be an excise for the privilege of doing business in this state . . . . . for such fractional year.

4. STATE TAX YEAR. The calendar year. (Acts 1935, No. 194, p. 256; Acts 1939, . No. 48, p. 56; Acts 1939, No. 369, p. 496; Code 1940, T. 51, § 425; Acts 1945, No. 130, p. 129; Acts 1945, No. 319, p. 520; Acts 1955, No. 568, p. 1232; Acts 1957, No. 639, p. 964; Acts 1978, No. 840, p. 1247, § 1.)

§ 40-16-2. Production credit associations taxable under chapter.

Production credit associations, incorporated pursuant to the provisions of the act of congress known as the Farm Credit Act of 1933, are not foreign corporations, and any such association which may become taxable by the state shall be subject to the same taxation imposed upon national banks under the provisions of this chapter, and such associations shall be exempt from all other forms of income, privilege and license taxes imposed by the state. (Acts 1965, No. 276, p. 390.)

§ 40-16-3. Returns.

(a) Every financial institution, as in this chapter defined, shall within the first 15 days of April in each year, make and file with the Department of Revenue a return, signed under the penalties of perjury by its cashier, treasurer or other authorized officer or employee, if a corporation, or by a person or authorized employee in charge of the conduct of the business to be taxed if an individual, firm, association or other legal entity, in such form as may be prescribed by the Department of Revenue, giving such detailed information as the Depart-

ment of Revenue may in its opinion require to determine the net income of such financial institution for the taxable year, by the net income of which said excise tax is to be measured.

(b) Qualified corporate groups, as in this chapter defined, shall have the option to file one excise tax return on a consolidated basis or to file separate returns. Qualified corporate groups electing to file one excise tax return on a consolidated basis shall be assessed a fee of $6,000 for the privilege of filing on a consolidated basis. Newly acquired corporations which have a potential separate return year as well as a consolidated year would have the option of filing a separate return including all of their income for that year or filing as part of the consolidated group for the entire taxable year. Newly created, controlled corporations would either file a separate return or as part of the consolidated return determined by the election of the corporate group for that year.

(c) In order for financial institution members of a controlled group to be eligible to elect to file on a consolidated basis, the members would have to meet the following two tests:

(1) OWNERSHIP TEST. Includable financial institutions will be connected through stock ownership with a common parent corporation, which financial institutions are includable corporations if:

a. Stock possessing at least 80 percent of the voting power of all classes of stock and at least 80 percent of each class of the nonvoting stock of each of the includable corporations (except the common parent corporation) is owned directly by one or more of the other includable corporations; and

b. The common parent owns directly stock possessing at least 80 percent of the voting power of all classes of stock and at least 80 percent of

each class of the nonvoting stock of at least one of the other includable corporations.

(2) FILING TEST. In order to be eligible for this election, each member must be a financial institution as defined in Section 40-16-1 and be required to file an excise tax return.

(d) To the extent operating rules are required for the filing of a consolidated excise tax return, the consolidated return regulations of the Internal Revenue Code and the principles contained therein would be used as a guideline in the absence of clarifying regulations issued by the Department of Revenue.

(e) The Department of Revenue may make such reasonable rules and regulations as it may deem necessary to determine the businesses conducted and in the state which are subject to said excise tax and to determine the net income of such businesses by which said tax is to be measured; provided, that any financial institution conducting a business both within and without the State of Alabama and coming within the provisions of this chapter shall be required to make a report to the Department of Revenue showing the amount of its income received from the business conducted by it within the State of Alabama and the expenses incurred by it in the conduct of its business within the State of Alabama. Failure to file any such return on or before the due date thereof in the absence of extension of time in writing for the filing thereof granted by the Department of Revenue shall subject the financial institution so failing to a penalty of 15 percent of the amount of tax assessed, which amount shall be assessed and collected as a part of the tax, and a like penalty of $5 per day for each day's failure to file such return, which penalty shall be collected by civil action. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 426; Acts 1971, No. 1941, p. 3136; Acts 1978, No. 840, p. 1247, § 2.)

§ 40-16-4. Levy; reporting of tax.

(a) Every such financial institution shall pay to the state annually for each taxable year an excise tax for the privilege of engaging in this state in the business of banking and of conducting a financial institution, as in this chapter defined, and of conducting a business employing moneyed capital coming into competition with the business of national banks measured by its net income for such taxable year at the rate of six percent of such net income. The amount of such excise tax shall not be in excess of any limit fixed thereon by any present or future federal statute relating to the taxation of national banks by this state. Under no circumstances will any dividends paid from a financial institution, as in this chapter defined, to the common parent corporation of a controlled group of corporations, as defined in Section 40-16-3, be subject to excise tax.

(b) The excise tax provided in this chapter shall be reported under blanks in the form to be prescribed by the Department of Revenue. The amount shown to be due by the taxpayer's return shall constitute and create a prima facie liability for such amount on which taxes shall be paid as hereinafter provided. The mailing of the excise tax blank to persons liable for the tax herein provided shall be the only notice required to be given, except where the department assesses an additional amount due. The failure to receive such blank shall not relieve any persons required to make a return from making such return or the penalties for failure to do so or liability for tax. Where the Department of Revenue determines that the amount due is different from that shown by the taxpayer's return or where no return is filed, the department may determine the correct amount due pursuant to the procedures set forth in Chapter 2A of this title. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 427;

Acts 1978, No. 840, p. 1247, § 3; Acts 1992, No. 92-186, p. 349, § 45.)

§ 40-16-5. When tax due; extension of time for payment.

The excise tax hereby levied and to be assessed shall be payable on or before April 15 of the current state tax year and on the same date of each state tax year thereafter for the privilege of engaging in such business within this state during the current state tax year of the corporation. If the financial institution has received a written extension of time to file the excise tax return from the department, then one half of the estimated tax due shall be payable on April 15 and the remaining one-half, plus interest, shall be payable when the return is filed. The Department of Revenue may, in its discretion, extend the time for the payment of the tax either by general extension to all taxpayers liable therefor or by special extension to a particular taxpayer. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 428; Acts 1943, No. 524, p. 490; Acts 1978, No. 840, p. 1247, § 4; Acts 1992, No. 92-186, p. 349, § 46.)

§ 40-16-6. Payment and distribution of tax.

The remittance of the excise tax herein required shall be made to the Department of Revenue at Montgomery, Alabama, with checks payable to the State Treasurer of Alabama. The proceeds of the excise tax herein imposed by this chapter shall be, without delay, covered into the state treasury to the credit of the Financial Institution Excise Tax Fund. Such amount of money as shall be appropriated for each fiscal year by the legislature to the Department of Revenue with which to pay the salaries, the cost of operation and the management of the said department shall be deducted, as a first charge thereon,

from the taxes collected under and pursuant to Section 40-16-4; provided, that the expenditure of said sum so appropriated shall be budgeted and allotted pursuant to Article 4 of Chapter 4 of Title 41 and limited only to the amount appropriated with which to defray the expenses of operating said department for each fiscal year. The balance of the tax collected under and pursuant to said Section 40-16-4 shall, on September 1 in each year, be distributed as follows: On certificate of the Department of Revenue the comptroller shall draw his warrant on the State Treasurer payable to the county treasurer of each of the several counties in which such financial institutions are located for an amount equal to one fourth of the tax received from the institutions located in such county, after deducting the proportionate part of the expenses incurred in the administration of this chapter. On similar certificate the comptroller shall draw his warrant on the State Treasurer in favor of the treasurer of each of the several municipalities in which such financial institutions are located for an amount equal to one half of the tax received from the institutions located in such municipalities, after deducting the proportionate part of the expenses incurred in the administration of this chapter. The amount remaining in such financial institution excise tax fund, after the payment of the expenses as heretofore in this chapter provided, and after the distribution to the counties and municipalities of their proportionate part of the said tax, shall be covered into the general fund of the State of Alabama. Any financial institution which conducts its business in more than one municipality or in more than one county in this state shall, in making the return required by this chapter, report in detail the percentage of its total business in the state conducted in each such municipality and in each such county, and the portions of tax paid by each such financial institution due to be distributed to the municipality

and county shall be distributed pro rata according to the percentage so reported to the several municipalities and counties where such business is conducted instead of solely to the one where the principal place of business of such financial institution is located in this state. No municipality or county within the state shall have the right to levy or assess any such excise tax for the privilege of engaging in such business in addition to that hereby levied and to be distributed to it as herein provided, except license taxes. However, license taxes on banks shall not be levied in excess of those which may be legally levied pursuant to Section 11-51-130, provided however, that the license authorized by subdivisions (1) through (12) of subsection (a) of Section 11-51-130 may be levied only by the municipality where the bank has its principal place of business. (Acts 1935, No. 194, p. 256; Acts 1939, No. 396, p. 517; Code 1940, T. 51, § 429; Acts 1943, No. 547, p. 536; Acts 1951, No. 839, p. 1470; Acts 1991, No. 91-478, p. 866, § 1.)

§ 40-16-7. Refunds.

Repealed by Acts 1992, No. 92-186, § 80, effective October 1, 1992.

§ 40-16-8. Exemptions and credits for other taxes.

All moneyed capital employed in the business the privilege of engaging in which is hereby taxed and the shares of all financial institutions, as in this chapter defined, shall be exempted from assessment and payment of ad valorem taxes, except the moneyed capital and shares of any business hereby taxed which fails to make and file the returns required by this chapter and to pay the tax levied by this chapter as and when in this chapter provided. The real estate owned by every such financial institution shall not be exempted. If any other tax, whether

on property (other than ad valorem taxes on real estate), income, business or any element thereof, except license taxes not in excess of those heretofore legally levied and in effect, is hereafter levied by this state or by any political subdivision of this state on any financial institution as in this chapter defined, the amount of such other tax due by such institution shall be credited on account of the tax payable pursuant to the provisions of this chapter; provided, that no other tax levied by this title shall be credited against the excise tax herein levied. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 431.)

CODE OF ALABAMA 1975

TITLE 40
REVENUE AND TAXATION

CHAPTER 21
PUBLIC UTILITIES

ARTICLE 2
LICENSE TAXES

§ 40-21-50. Levied generally.

For each person operating a public utility, such as a street railroad or interurban railroad operated by electricity or other motive power, waterworks, gas company, pipeline company for transporting or carrying gas, oil, gasoline, water or other commodities, gas distributing companies, whether by means of pipeline or by tanks, drums, tubes, cylinders or otherwise, heating companies or other public utility, except electric, hydroelectric, telephone or telegraph companies, railroad or sleeping car companies and express companies which are otherwise licensed, shall pay to the state a license tax equal to two and two-tenths percent on each $1 of gross receipts of such public utility in this state for the preceding year. For the first year's business, where an existing public utility is taken over, such license tax payable to the state shall be equal to two and two-tenths percent on each $1 of the gross receipts for the preceding year of the public utility taken over, less whatever sum the prior operators have paid as such license tax on the gross receipts for that year. Where no existing public utility is taken over, such license tax for the first year, as well as for the second year, shall be based on the first year's business, but shall in no event be less than $100 for the first year's business; provided, that where business is started after April 1 the payment shall be not less than $50. Any

person establishing a new public utility shall pay to the state the sum of $100 where operation is begun between October 1 and April 1 and $50 when operation is begun after April 1 and shall also at the same time execute a bond, payable to the State of Alabama, to insure payment of whatever sum, in addition to the $100 or $50, which may be due when, at the end of the first year or if operation began after April 1, the amount of the gross receipts is ascertainable. Such license tax shall be paid to the Department of Revenue by check made payable to the treasurer and shall be paid quarterly, one fourth on October 1, one fourth on January 1, one fourth on April 1 and one fourth on July 1 and shall become delinquent on the fifteenth day of each said month, based upon gross receipts for the preceding year, or half year if operations began after April 1. The payment of such license shall be accompanied by a sworn statement made on forms furnished by the Department of Revenue by the president, manager or operating officer of the public utility, or by the owner, receiver, or trustee thereof, giving the name of the person, firm, or corporation owning and operating said public utility and the principal place of business thereof, showing the gross receipts of such public utility for the preceding year. The books of every person operating a public utility shall be at all times open to the inspection of the Department of Revenue. Any person failing to make such sworn statement or willfully making a false statement of the gross receipts of such public utility shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding $500 and shall also forfeit to the state three times the amount of the license on said utility, but no license under this schedule shall be paid to the county or counties. (Acts 1935, No. 194, p.256; Code 1940, T. 51, § 177; Acts 1971, No. 1417, p. 2420, § 1.)

§ 40-21-51. Distribution of revenues generally.

All revenues collected under the provisions of Section 40-21-50 shall, after deduction of the cost of collection, be distributed in the following manner:

(1) Eighty-five percent of the balance remaining after deduction of the cost of collection shall be deposited in the Special Mental Health Fund to be used for mental health purposes; and

(2) Fifteen percent of the balance remaining after deduction of the cost of collection shall be deposited in the state general fund. (Acts 1971, No. 1417, p. 2420, § 2.)

§ 40-21-52. Freight lines and equipment companies.

Any person, firm, joint-stock association, or corporation, wherever organized or incorporated, engaged in the business of operating, renting, leasing, or furnishing cars not otherwise listed for taxation in this state for the transportation of freight, whether such freight is owned by such company or any other person, firm, joint-stock association, or corporation, over any railroad or railway line or lines in whole or in part within this state, such line or lines not being owned, leased, or operated by such person, firm, joint-stock association, or corporation, whether such cars are termed box, flat, coal, ore, tank, stock, gondola, furniture, automobile, refrigerator, or some other name, shall be deemed to be a freight line or equipment company. Each freight line or equipment company doing business, owning, operating, renting, leasing, or furnishing cars which are operated in this state shall, on or before March 1 each year, make and file with the Department of Revenue on a form or forms prescribed by the Department of Revenue a statement under oath by its president, secretary, treasurer, superintendent, manager, receiver, trustee, or owner, showing

the number of miles run by all its cars over the line or lines of each separate railroad or railway in this state, naming each separate railroad or railway, and the total number of miles run by all of its cars over all line or lines of all railroads or railways in this state, and the total number of miles run by its cars over line or lines or railroads or railways everywhere outside of this state, such mileage to be shown as made for the 12-month period preceding October 1 of each year. There shall be shown on the statement the principal place of business, together with the street address of each freight line or equipment company, together with the names and addresses of persons to whom correspondence or tax notice should be sent. It shall be the duty of the Department of Revenue to examine the statement of each freight line or equipment company, and the reports of each railroad or railway company over whose lines such freight line or equipment moved, and from such statements and reports to compute the average number of cars within the state of each freight line or equipment company for the 12 months preceding October 1 of each year; for the average number of cars found to be in the state for such 12 month period, the reasonable value of such cars shall be computed, and the sum total value of the average number of cars shall be reduced to 30 percent thereof. There is hereby levied and it shall be the duty of the Department of Revenue to assess a license tax of three and one-half percent of the 30 percent value of the average number of cars within the state for the period of 12 months preceding October 1 of each year. Such tax shall be assessed pursuant to the procedures for assessment of tax as set out in Chapter 2A of this title.

The tax shall become due on the date of entry of the preliminary assessment and shall be delinquent 30 days after the due date. The tax shall be paid to the Department of Revenue, by check made payable to the treasurer, and the license tax so paid shall be placed to the credit of the state general fund. Each railroad or railway company in this state shall also, annually before March 1 of each year, make and file with the Department of Revenue, under oath of some executive officer of the company and on forms prescribed by the Department of Revenue, a report containing as to all its lines in Alabama all the data required of freight line or equipment companies and any additional information deemed necessary by the Department of Revenue. Any person, firm, corporation, or association operating, renting, leasing, or otherwise furnishing cars as above mentioned, except a regularly organized and operated railroad, is deemed to be a freight line equipment company. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 176; Acts 1971, No. 1413, p. 2408; Acts 1992, No. 92-186, p. 349, § 62.)

§ 40-21-53. Electric, hydroelectric, gas, or any other public utility—Generally—Credit on electric bills for certain persons—Amount.

(a) Each person, firm, or corporation, including any corporations operating an electric or hydroelectric public utility or gas public utility or any other public or municipal utility now paying the two and two-tenths percent shall be subject to the provisions of this section and shall pay to the state a license tax equal to two and two-tenths percent on each $1 of gross receipts of such public utility for the preceding year; except, that gross receipts from the sale of electricity for resale by such electric or hydroelectric public utilities and gross receipts from the sale of electricity to the persons identified in subsection (b) of this section shall be deducted in computing the amount of tax due hereunder. For the first year's business, where an existing electric public utility is taken over, such license tax payable to the state shall be equal to two and two-tenths percent on each $1 of gross receipts for the

preceding year of the electric utility taken over, after deduction of gross receipts derived from sales of electricity for resale and gross receipts from the sale of electricity to the persons identified in subsection (b) of this section and less whatever sum the prior operators shall have paid as such license tax on the gross receipts for that year. Where no existing electric public utility is taken over, the license tax for the first year upon such utility shall be based upon the first year's business, computed as provided hereinabove, but shall in no event be less than $100 for the first year's business. Any person, firm, or corporation establishing a new electric public utility shall pay to the state the sum of $100 and shall also at the same time execute a bond payable to the State of Alabama to insure payment of whatever sum in addition to such $100 may be due when, at the end of the first year the amount of gross receipts for the year is ascertainable. Such license tax shall be paid to the Department of Revenue by check made payable to the treasurer and shall be paid quarterly, one fourth on October 1, one fourth on January 1, one fourth on April 1 and one fourth on July 1 and shall become delinquent on the fifteenth day of each of said months. Payment shall be accompanied by a statement made by the president or other officer of the public utility or by the owner thereof, giving the name of the person, firm, or corporation owning and operating such public utility and the principal place of business thereof, together with a statement under oath of the amount of gross receipts of such public utility for the preceding year. The books of every person, firm, or corporation operating such public utility shall be at all times open to the inspection of the Department of Revenue. Any person failing to make such sworn statement or willfully making a false statement of the gross receipts of such public utility shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not exceeding $500

and shall also forfeit to the state three times the amount of the license for such public utility, but no license under this schedule shall be paid to the county or counties.

(b)(1) On or after October 1, 1981 any person who is 62 years of age or older or totally and permanently disabled and such person is head of a household and does not share his or her residence with more than one other adult person who is less than 62 years of age and who receives electricity at such residence from a utility which is subject to the 2.2 percent license tax levied in subsection (a) of this section shall be entitled to qualify, in accordance with the provisions of subdivision (2) of this subsection, for a credit on his or her monthly electric bill in the amount of the exemption from the 2.2 percent license tax with respect to sales of electricity to such person provided in subsection (a) of this section; provided that the combined gross incomes of all persons who live at the residence of such person 62 years of age or older or such totally and permanently disabled person shall not exceed $12,000 annually. Eligibility for this credit applies only to the extent and amount that it is billed to the customers as a normal requirement under its rates.

(2) Any person who seeks to qualify for the credit provided in subdivision (1) of this subsection shall make application to the Department of Pensions and Security in accordance with the rules promulgated by the Department of Pensions and Security for the implementation and enforcement of this section. The Department of Pensions and Security shall periodically notify, in writing, each electric utility in the state which is subject to payment of the 2.2 percent license tax levied in subsection (a) of this section regarding those customers who are entitled to receive the monthly credit. Within 45 days after receipt of notification for such monthly credit the electric utility shall commence

providing such credit for gross receipts license tax that otherwise would be billed.

(3) Any person who wrongfully qualifies for such exemption by giving false information shall be guilty of a misdemeanor and upon conviction may be fined not to exceed $500. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 178; Acts 1971, No. 1412, p. 2406, § 1; Acts 1981, No. 81-867, p. 1659.)

§ 40-21-54. Electric, hydroelectric, gas, or any other public utility—Not to constitute part of gross receipts for purposes of computation of state, county or municipal tax, etc.

The provisions of any state, county or, municipal ordinance or law to the contrary notwithstanding, the tax levied and collectible pursuant to Section 40-21-53 shall be deductible from and shall not constitute a part of gross receipts for purposes of computing the amount due under any state, county or municipal tax, excise, license, or fee which is based upon or measured by the gross receipts of any person, firm, municipality, or corporation operating an electric or hydroelectric public utility subject to the tax levied by said section. (Acts 1971, No. 1412, p. 2406, § 2.)

§ 40-21-55. Electric, hydroelectric, gas, or any other public utility—Distribution of revenues.

All revenues collected under the provisions of Section 40-21-53 shall, after deduction of the cost of collection, be distributed in the following manner:

(1) Eighty-five percent of the balance remaining after deduction of the cost of collection shall be deposited in the Special Mental Health Fund to be used for mental health purposes; and

(2) Fifteen percent of the balance remaining after deduction of the cost of collection shall be deposited in the general fund. (Acts 1971, No. 1412, p. 2406, § 3.)

§ 40-21-56. Manufacturers and sellers of hydroelectric power.

In addition to all other taxes of every kind now imposed by law or otherwise imposed by this title, there is hereby levied a license or privilege tax upon each person, firm, corporation, agent or officer engaged in the business of manufacturing and selling hydroelectric power in the State of Alabama for the privilege of engaging in such business; said license or privilege tax shall be due and payable in advance, on or before September 25 of each year, and shall be in sum equal to two fifths of a mill upon each kilowatt hour of hydroelectric power manufactured and sold during the preceding calendar year. (Acts 1935, No. 194, p.256; Code 1940, T. 51, § 179; Acts 1957, No. 551, p. 772.)

§ 40-21-57. Railroads.

Repealed by Acts 1994, No. 94-714, effective May 4, 1994.

In addition to all other taxes imposed by this title, there is hereby levied a license or privilege tax upon each person engaged in the business of operating a railroad in the State of Alabama for the privilege of engaging in such business; said license tax or privilege tax shall be due and payable annually in advance on or before September 25 of each year to the Department of Revenue by check made payable to the treasurer, and shall be in a sum equal to two and one-half percent of the gross receipts in excess of $150,000 of such railroad from all intrastate business of such railroad within the State of Alabama during the preceding year, the gross intrastate earning to be determined by the amount received from

intrastate business. (Acts 1935, No. 194, p. 256, Code 1940, T. 51, § 180; Acts 1943, No. 519, p. 487; Acts 1957, No. 547, p. 767; Acts 1971, No. 1415, p. 2411.)

§ 40-21-58. Telephone business.

Repealed by Acts 1992, No. 92-623, § 16, effective September 30, 1992.

In addition to all other taxes imposed by this title, there is hereby levied a license or privilege tax upon each person engaged in the telephone business in the state of Alabama for the privilege of engaging in such business, and said license or privilege tax shall be due and payable annually in advance on or before September 25 of each year to the department of revenue, by check made payable to the treasurer, and shall be in a sum equal to two and one-half percent of the total gross receipts of such telephone company from all the intrastate business within the state of Alabama during the preceding calendar year, the gross intrastate earnings to be determined by the amount received from intrastate business and from messages originating at points in Alabama destined to other points in Alabama although transmitted through another state, said last named earnings to be apportioned on the basis of earnings per mile transmitted. (Acts 1935, No. 194, p. 256; Acts 1936-37, Ex. Sess., No. 58, p. 36; Code 1940, T. 51, § 182; Acts 1957, No. 548, p. 768; Acts 1971, No. 1411, p. 2405.)

§ 40-21-59. Telegraph business.

Repealed by Acts 1992, No. 92-623, § 17, effective September 30, 1992.

Each person engaged in the business of operating in this state a telegraph system or telegraph line for hire, and without reference to its interstate commerce or governmental business which it is not proposed to tax, shall,

in addition to all other taxes of every kind imposed by this title, pay to the department of revenue annually in advance on or before October 15 of each year, by check made payable to the treasurer, a sum equal to two and one-half percent of the total gross receipts of such telegraph company from all intrastate business within the state of Alabama during the preceding calendar year. The gross intrastate earnings shall be determined by the amount received from intrastate business and from messages originating at points in Alabama destined to other points in Alabama although transmitted through another state, said last named earnings to be apportioned on the basis of earnings per mile transmitted;. and no telegraph company which has paid the license or privilege tax herein required shall be liable to pay any license or privilege tax to counties and shall not exempt its real estate, fixtures and other property, which shall be subject to taxation as other property in the state, nor shall such payment exempt such corporation from the payment of franchise or income tax. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 183; Acts 1971, No. 1410, p. 2405.)

§ 40-21-60. Express companies—Generally.

In addition to all other taxes of every kind imposed by this title, there is hereby levied a license or privilege tax upon each person engaged in the business of operating an express company in the State of Alabama for the privilege of engaging in such business; said license or privilege tax shall be due and payable to the Department of Revenue by check made payable to the treasurer annually in advance, on or before October 1 of each year, and shall be in a sum equal to two and one-half percent of the gross receipts of such express company from all the intrastate business within the State of Alabama during the preceding calendar year. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 84.)

§ 40-21-61. Express companies—Alternative Tax.

There shall be levied and collected from every person doing an express business between points wholly within this state and without reference to its interstate business, whether incorporated under the laws of this state or any other state or whether incorporated at all, a license or privilege tax of $4,000, which shall be paid to the Department of Revenue by check made payable to the treasury by said company on or before the expiration of the fifteenth day of each fiscal year; provided, that any express company which operates on less than 50 miles of railroad, street railway, motor line, or boat line shall pay an annual tax of $250; and provided, that any express company which operated on 50 miles of railroad, street railway, motor line, or boat line, and less than 200 miles of railroad, street railway, motor line or boat line, shall pay an annual license of $500; and provided further, that all express companies that operate on 200 and not over 500 miles shall pay an annual tax of $2,500. It is not intended that the taxpayer under this section and Section 40-21-60 shall pay both the taxes therein mentioned, but that the taxpayer shall pay the larger of the two. The tax levied by this section and Section 40-21-60 shall not apply to bus lines which pay a license and mileage tax under Chapter 19 of this title and which carry express as a regular part of their business of hauling passengers. (Acts 1935, No. 432, p. 910; Code 1940, T. 51, § 185.)

§ 40-21-62. Report of gross receipts by utility.

In all cases where a public utility is required under this title to pay a privilege or license tax on gross receipts, such public utility shall make report to the Department of Revenue of such gross receipts to which such tax is applicable in a manner and form which will show the correct and true amount of such gross receipts upon

which the tax is computed. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 181.)

§ 40-21-63. Receipts from department.

The Department of Revenue shall, upon receipt of any amount of money due for tax on gross receipts of any public utility, mail to such utility paying the tax a receipt therefor. Such a receipt shall state specifically the section of this title levying the tax for which such receipt is given. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 187.)

§ 40-21-64. Counties not to levy privilege or license taxes.

No county shall levy a privilege or license tax on any business or occupation on which a privilege or license tax is levied by this article or on any telephone or telegraph utility business. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 188; Acts 1992, No. 92-623, p. 1466, § 13.)

CODE OF ALABAMA 1975

TITLE 27
ALABAMA INSURANCE CODE

CHAPTER 4
FEES AND TAXES

* * *

§ 27-4-9. Taxation by counties not allowed.

No license or privilege tax shall be charged any insurer by or on behalf of any county. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 826; Acts 1971, No. 407, p. 707, § 84.)

LICENSE CODE
OF
JEFFERSON COUNTY
ALABAMA

This License Code of Jefferson County, Alabama, originally adopted as Ordinance No. 1 of the Jefferson County Commission on September 10, 1968, and as amended through Ordinance No. 1172 on January 24, 1989, is hereby recompiled and published as follows:

Section 1. . That the codification of the License Code of Jefferson County, Alabama, for the fiscal year 1989-1990, and each fiscal year thereafter as set out in Section 2 through 25 hereof, be and the same is adopted as the License Code of Jefferson County, Alabama, for the fiscal year of 1989-1990, beginning October 1, 1989, and running through September 30, 1990, and each fiscal year thereafter.

Section 2. . . . The following is hereby declared to be the schedule of licenses for the fiscal year commencing October 1, 1989, and running through September 30, 1990, and for each fiscal year thereafter, for diverse businesses, vocations, occupations and professions engaged in or carried on in Jefferson County, Alabama, in each fiscal year and it shall be unlawful for each and every person, firm, company or corporation engaged in any business, vocation, occupation or profession enumerated herein in each fiscal year to fail to pay and take out such licenses in such sums as are herein provided. In addition there shall be charged an issuance fee of One Dollar which shall include mailing costs.

2 — ADVERTISING — Each person, firm or corporation who solicits within Jefferson County intrastate advertising

to be done for persons, firms or corporations having places of business in Jefferson County by means of radio broadcasting or televising through radio or television stations situated in Jefferson County, Alabama, shall pay a license of $ 150.00.

It is intended that no license shall be levied by this schedule upon interstate radio broadcasting, televising and/or advertising solicitation.

5 — AGENTS, DEALERS OR OTHER BUSINESSES: (a) Each person, firm or corporation who, as principal, agent or in any other capacity, shall engage in or transact any trade, business, commerce, occupation, vocation or profession for gain or profit and for whom no other license is specifically required by this Code, shall pay a license as follows:

Where gross annual business from said business from the previous year is less than

$ 5,000	$15.00
$ 5,000 and less than $ 10,000	25.00
$10,000 and less than $ 15,000	37.50
$15,000 and less than $ 20,000	50.00

Plus an amount equal to 1/40 of 1% of gross annual business in excess of $ 20,000.

(b) . Any person, firm or corporation, who shall maintain, keep in repair or otherwise man any office, store, warehouse, place of business, telephone wires, telegraph wires, right of way, easement, land or other facility or facilities situated in Jefferson County, Alabama, in connection with any business, vocation, occupation or profession which is not subject to a license under any other schedule of this Code or under (a) of this schedule shall pay for the protection afforded by the laws, ordinances, rules and regulations of Jefferson County, Alabama, and its agencies to such person, firm or corporation in connection with the maintaining, keeping in repair or otherwise manning any such office, store, warehouse, place of business, telephone wires, telegraph wires, right of way, easement, land or other facility or facilities an annual license fee or tax as follows: Where there was employed in connection with the maintaining, keeping in repair or otherwise manning any such office, store, warehouse, place of business, telephone wires, telegraph wires, right of way, easement, land or other facility or facilities during the next preceding calendar year in Jefferson County, Alabama, an average daily number of employees:

Less than two persons	$ 15.00
Two but less than four persons	30.00
Four but less than six persons	45.00
Six but less than ten persons	60.00
Ten but less than fifteen persons	75.00
Fifteen persons or more	90.00

Plus $5.00 for each person in excess of fifteen.

6 — AIRCRAFT — Each person, firm or corporation engaged in the sale, rental, chartering, or leasing of aircraft and/ or the alteration, rebuilding, or repairing of same, shall pay a license of 1/40 of 1% of the gross receipts from said business from the previous year with a minimum license of ..... $ 50.00

7 — BOOKKEEPERS AND TAX CONSULTANT — Each person, firm or corporation doing business as a bookkeeper or tax consultant for hire shall pay a license where gross fees from services rendered during the year next preceding the current license year are less than:

$ 5,000	$15.00
$ 5,000 and less than $ 10,000	25.00
$ 10,000 and less than $ 15,000	37.50
$ 15,000 and less than $ 20,000	50.00
$ 20,000 and less than $ 25,000	62.50
$ 25,000 and less than $ 30,000	75.00

Plus an amount equal to 1/10 of 1% of subject professional fees in excess of $30,000.00.

9 — AUTOMOBILE POLISHING AND/OR WASHING — Each person, firm or corporation whose principal business is the polishing, waxing, and/or washing of automobiles or other motor vehicles shall pay a license of $37.50. Where polishing, waxing, and/or washing of automobiles is incidental to the principal business a license fee of $ 9.00 will be paid.

10 — TRAILERS — AND AUTOMOBILE DRIVE-IT-YOURSELF CARS AND TRUCKS — Each person, firm or corporation engaged in the business of renting or leasing trailers or in the business of what is commonly known as a "Drive-It-Yourself Business," operating automobiles and trucks as rent cars or trucks, or on any plan by which persons pay for their service or use, but not including jitneys, taxi-cabs, or sightseeing buses, shall pay a license based on the number of such trailers, automobiles and trucks employed in the business as follows:

1	Unit and not more than 5 Units	$ 50.00
6	Units and not more than 10 Units	100.00
11	Units and not more than 25 Units	200.00
26	Units and not more than 50 Units	300.00
51	Units and not more than 100 Units	400.00
101	Units and not more than 250 Units	500.00
251	Units and over	600.00

The number of units normally employed in the business shall be used as the basis of the above license.

Any person, firm or corporation who pays a license under this paragraph and who leases automobiles from any other person, firm or corporation which pays a license under this paragraph then only the owner of the automobiles will include said automobiles in the number of units on which he purchases his license. It being the

intention that only one license as provided for under this paragraph be purchased on any automobile.

11 — AVIATION SCHOOLS — Each person, firm or corporation offering for hire instruction and training in navigating and/or flying aircraft of any kind shall pay a license of 1/4% of the gross receipts from said business from the previous year with a minimum of $ 50.00.

12 — BAKERY — Each person, firm or corporation conducting a bakery as its principal business and in connection therewith operating a vehicle on a street or public highway, shall pay a license of 1/40 of 1 % of the gross receipts from said business from the previous year with a minimum license of $ 50.00.

Where such business does not operate a motor vehicle on the streets or public highways in connection with said business, and gross receipts are:

Less than $ 50,000	$ 30.00
$ 50,000 and not more than $ 100,000	50.00

Plus an amount equal to 1/40 of 1% of gross receipts in excess of $ 100,000.

The aforesaid schedule of license shall also apply to the making of donuts where the same are sold at wholesale only.

13 — BAKERY GOODS, INCLUDING DONUTS — Each retail dealer in bakery goods and donuts, when principal business, shall pay a license of 1/40 of 1% of the gross receipts from said business from the previous year with a minimum license of $ 30.00.

14 — BARBER AND/OR BEAUTY SUPPLY HOUSE — Each person, firm or corporation shall pay a license of 1/40 of 1% of the gross receipts, less sale price of returned goods and amount of adjustment on sales, from said busi-

ness from the previous year with a minimum license of $ 50.00.

16 — BOOTBLACKING — Each person, firm or corporation engaged in Bootblacking shall pay an amount in dollars equal to four and one-half (41/2) multiplied by the number of patrons who can be accommodated at one time by the seating facilities provided for bootblacking purposes, but in no event less than $4.50.

19 — CEMETERY, OR MAUSOLEUM COMPANIES — Each person, firm or corporation, operating a cemetery or mausoleum company, for gain or profit, shall pay a license where gross annual receipts are less than:

$ 10,000	$ 25.00
$ 10,000 and less than $ 20,000	50.00
$ 20,000 and less than $ 40,000	100.00
$ 40,000 and less than $ 60,000	150.00
$ 60,000 and less than $ 80,000	200.00
$ 80,000 and less than $ 100,000	250.00

Plus an amount equal to 1/40 of 1% of gross annual business in excess of $ 100,000.

21 — METALLURGIST, SURVEYORS, AND ENGINEERS — Each person, firm or corporation where gross professional fees from services during the year next preceding are less than:

$ 5,000	$15.00
$ 5,000 and less than $ 10,000	25.00
$ 10,000 and less than $ 15,000	37.50
$ 15,000 and less than $ 20,000	50.00
$ 20,000 and less than $ 25,000	62.50
$ 25,000 and less than $ 30,000	75.00

Plus an amount equal to 3/40 of 1% of subject fees in excess of $ 30,000.

25 — AMUSEMENT AND ENTERTAINMENT — (a) Each person, firm or corporation engaged in the business of promoting, producing or presenting professional wrestling matches, basketball games, or other athletic events shall pay a license of 1/16 of 1% of the gross receipts from said business from the previous year with a minimum license of $100.00.

(b) TRANSIENT EVENT LICENSE FEE — Where any of the above enumerated events are transient in nature and such events will be for a period of less than 5 days in any calendar year, a license shall be paid for each day in the amount of $ 7.50.

26 — HOUSEMOVERS AND/OR HOUSE WRECKERS — Each person, firm or corporation engaged in the business of house moving or house wrecking shall pay a license of $ 60.00.

27 — COURT REPORTING — Each person, firm or corporation engaged in the business of court reporting, where gross fees from services rendered during the year next preceding are less than:

$ 5,000	$15.00
$ 5,000 and less than $ 10,000	25.00
$ 10,000 and less than $ 15,000	37.50
$ 15,000 and less than $ 20,000	50.00
$ 20,000 and less than $ 25,000	62.50
$ 25,000 and less than $ 30,000	75.00

Plus an amount equal to 1/10 of 1% of subject fees in excess of $ 30,000.

29 — CURB MARKET, COVERED — Any person, firm, corporation or association who, or which, is in charge or control of any building, shed, tent or other structure or any group of buildings, sheds, tents, or other structures situated upon a contiguous area of land, the ground

story or stories of which is or are designated or used for the contemporaneous conduct of four or more separate businesses of the class herein described, and who, or which, is engaged in the business of granting to others, for compensation, rights to use ground floor space in or under any such shelter or structure for the purpose of their keeping or displaying poultry, game, eggs, butter, cheese, fruits, vegetables and/or other farm or garden products, for sale, shall pay for the privilege of so engaging in the business of granting such rights, an amount equal to 4/10 of 10 per square foot of ground area sheltered by such structure or structures, but in no case less than $ 30.00.

30 — CURB MARKET, OPEN — Any person in charge or control of any open air contiguous area of land, who shall engage in the business of granting to others, for compensation, rights to occupy open air space in or upon such area for the purpose of there keeping or displaying either upon vehicles, stands, or otherwise, poultry, game, eggs, butter, cheese, fruits, vegetables, and/or other farm or garden products, for sale, shall pay for the privilege of so engaging in the business of granting such rights an amount equal to 2/10 of l(P per square foot of ground within the limits set aside for, or devoted to, such occupancy, but in no case less than $ 30.00.

31 — DENTAL DEPOT OR LABORATORY — Each person, firm or corporation operating a dental depot or dental laboratory shall pay a license of 3/80 of 1% of the gross receipts from said business from the previous year with a minimum license of $ 30.00.

32 — DISINFECTANTS, INSECTICIDES AND/OR EXTERMINATORS — Each person, firm or corporation whose principal business is disinfectants, insecticides

and/or exterminating shall pay a license of 1/40 of 1% of the gross receipts, less returned goods, from said business from the previous year with a minimum license of $ 30.00.

Where only service is rendered the license shall be paid on the basis of the number of workers.

Where only one worker	$15.00
Where 2 and less than 4 workers	30.00
Where 4 and less than 6 workers	45.00
Where 6 and less than 10 workers	60.00
Where 10 and less than 15 workers	75.00
Where 15 and over	90.00

33 — DRESS SHOPS, CLOTHING SHOPS, SHOE AND/OR HAT SHOPS — Each person, firm or corporation engaged in the principal business of selling at retail ready-to-wear clothes, shoes, hats or other wearing apparel, including any such products stored in a warehouse for sale, lease, distribution or delivery, whether as owner, dealer, agent or consignee shall pay a license on each place of business where the gross receipts from such business, including receipts of leased departments, for the preceding year were less than:

$ 50,000	$ 30.00
$ 50,000 and not exceeding $ 100,000	50.00

Plus an amount equal to 1/40 of 1% of gross receipts in excess of $ 100,000.

34 — PRESCRIPTION SHOP — Each person, firm or corporation engaged in the operation of a prescription shop, where prescriptions are filled as its principal business shall pay a license on each place of business where gross receipts are less than:

$ 30,000	$ 50.00

An additional license shall be paid equal to 1/40 of I% of such gross receipts in excess of $30,000.

35 — EMPLOYMENT AGENCY — Each person, firm or corporation operating as a labor agent or as an employment agency shall pay a license computed as follows: Where gross fees or service charges for the year next preceding were less than:

$ 10,000	$ 100.00
$ 10,000 and less than $ 20,000	125.00
$ 20,000 and less than $ 30,000	150.00
$ 30,000 and less than $ 40,000	175.00
$ 40,000 and less than $ 50,000	200.00
$ 50,000 and less than $ 60,000	225.00
$ 60,000 and less than $ 70,000	250.00
$ 70,000 and less than $ 80,000	275.00
$ 80,000 and over	300.00

With a minimum license of $ 100.00 in any case.

37 — FISH AND OYSTER PEDDLER — Each person, firm or corporation who is engaged in selling fish or oysters in the county without regularly maintaining a place of business for such sales in the county shall pay a license of $ 50.00 on each truck or vehicle used in said business.

38 — FLORIST — Each person, firm or corporation engaged in the floral trade as his principal business where gross annual receipts for the next preceding year are less than:

$ 5,000	$ 15.00
$ 5,000 and less than $ 10,000	25.00
$ 10,000 and less than $ 15,000	37.50
$ 15,000 and less than $ 20,000	50.00

Plus an amount equal to 1/40 of 1% of gross receipts in excess of $ 20,000.

40 — GUARD, PATROL OR SECURITY SERVICE — Each person, firm or corporation operating and/or providing a private police patrol, security or guard service or armored cars for the transportation of money for hire shall pay a license for each employee or person so engaged as follows:

Where only one worker	$ 15.00
Where two and less than four workers	30.00
Where four and less than seven workers	45.00
Where seven and less than eleven workers	62.50
Where eleven or more	75.00

Plus $ 5.00 for each worker in excess of eleven.

41 — RETAIL FOOD STORE — Each person, firm or corporation engaged in the business of selling at retail those products ordinarily sold in retail food stores, including but not limited to canned goods, vegetables, fruits, condiments, sugar, coffee, tea, dairy products, bakery goods, meats, and prepared foods for off premises consumption, shall pay a license of $ 37.50 on the first $ 20,000 or less of gross receipts, including receipts of leased departments, from such business for the year next preceding plus an amount equal to 1/40 of 1% of all gross receipts in excess of $ 20,000.

42 — ICE CREAM AND/OR SNOWBALLS — Each person, firm, or corporation whose principal business is the retailing of ice cream, frozen yogurt or ice snowballs, except restaurants serving meals and/or where sold in a drug store, shall pay a license where gross receipts are less than:

$ 20,000	$ 15.00
$ 20,000 and not more than $ 30,000	25.00
$ 30,000 and not more than $ 40,000	37.50
$ 40,000 and over	50.00

43 — INDUSTRIAL TRAFFIC MANAGER OR MANAGEMENT AND RATE INFORMATION BUREAU — Each industrial traffic manager, or person, firm or corporation, operating a management and rate information bureau shall pay a license of $ 50.00.

44 — INFIRMARIES, HOSPITALS, CLINICS, SANITARIUMS, AND/ OR NURSING HOMES — Each person, firm or corporation conducting or operating an infirmary, hospital, clinic, sanitarium, sanitarium, and/or nursing home shall pay a license for each such place based on the number of rooms in such place.

Where less than 20 rooms	$ 30.00
20 rooms and less than 35 rooms	45.00
35 rooms and less than 50 rooms	60.00
50 rooms and less than 75 rooms	90.00
75 rooms and less than 100 rooms	120.00
100 rooms and over	150.00

All rooms, whether as wards for patients or bedrooms for others, to be liable for said license.

45 — INSPECTOR — Each person, firm or corporation engaged in the business of inspecting steel, steel products, concrete and concrete products, and other inspections where a fee is charged.

Where only one inspector	$15.00
2 inspectors and less than 4	30.00
4 inspectors and less than 6	45.00
6 inspectors and less than 10	60.00
10 inspectors and less than 15	75.00
15 inspectors and less than 20	90.00
20 inspectors and less than 25	105.00
25 inspectors and over	120.00

47 — JITNEYS — Each person, firm or corporation operating a jitney with a seating capacity of five (5) or less shall pay a license of $ 15.00.

Each person operating a jitney with a seating capacity of more than five (5) shall pay a license of $ 60.00 plus $ 16.00 additional for each seat in excess of five (5).

48 — JUNK WAGONS OR TRUCKS — Each person, firm or corporation operating a junk wagon or truck not owned by a licensed junk yard shall pay a license for:

Each Wagon	$ 12.50
Each Automobile or Truck	25.00

49 — LANDSCAPE GARDENERS AND ARCHITECTS — Each person, firm or corporation where gross receipts for the year next preceding are less than:

$ 3,000	$ 15.00
$ 3,000 and less than $ 5,000	24.00
$ 5,000 and less than $ 7,500	36.00
$ 7,500 and over	50.00

50 — MANUFACTURING, FABRICATING, PROCESSING PLANT — Each person, firm or corporation or association engaged in the business of manufacturing, fabricating and/or processing by hand, machinery or otherwise, wares or material of any kind, shall pay a license equal to 1/40 of 1% of the gross receipts from sales or stock transfers thereof, less adjustments and returned goods, from said business from the previous year with a minimum license of $30.00.

51 — MERCHANDISE RETAIL — WHOLESALE — Each person, firm, or corporation engaged in the business of offering for sale, leasing, taking or soliciting orders for sale, or leasing or selling merchandise of any description, including any such products stored in a warehouse for sale, lease, distribution or delivery, whether as owner, dealer, agent or consignee, shall pay a license where the gross receipts from such business, in-

cluding receipts of leased departments, for the year next preceding, less returned goods were:

(a) $ 60,000 or less ..... $ 15.00

(b) Where gross receipts as above defined exceed $ 60,000, the annual license lee shall be 1/40 of 1 % of all gross receipts. Provided, however, there shall be a minimum license of $15.00.

52 — MESSENGER SERVICE — Each person, firm or corporation operating as a messenger service, delivering messages only, shall pay a license of $ 12.00. Each person, firm or corporation engaged in package delivery, shall pay a license for each vehicle as follows: Less than 12,000 pounds Gross Vehicle Weight

(G.V.W.) ..... $ 6.00

12,001 to 42,000 pounds G.V.W 12.00

Over 42,000 pounds G.V.W 15.00

For the purpose of this subsection, gross vehicle weight shall mean the empty weight of the truck or truck tractor plus the heaviest load to be carried.

Where a trailer is used, an additional license shall be paid equal to one-fourth of the amount due to be paid on the vehicle to which the trailer is attached.

53 — MORTGAGE LOANS — Each person, firm, or corporation lending money on mortgages secured by real estate in this county shall pay a license based on the aggregate amount of brokerage, commissions and fees for such loans. The license fee shall be an amount equal to 3/32 of 1% of the aggregate amount of brokerage, commission and fees received during the year next preceding with a minimum license of $ 30.00.

55 — NEWSPAPERS AND MAGAZINES — Each person, firm or corporation issuing any kind of a newspaper or magazine shall pay a license on the following basis:

Where gross receipts including receipts from advertising from said business for the year next preceding were less than:

$ 25,000 ..... $ 15.00

$ 25,000 and less than $ 60,000 ..... 30.00

$ 60,000 and less than $100,000 ..... 50.00

Plus an amount equal to 1/40 of 1 % of all gross receipts, including advertising receipts, in excess of $ 100,000.

In addition to the license required by this schedule, there shall be paid an additional license of $50.00 where newspapers are sold on the public streets, sidewalks or other public property where such sales are made by individuals.

57 — NEWSBOYS — Each person selling newspapers on the public streets for which no privilege license under Subsection 55 is paid by the person, firm or corporation conducting or issuing such newspapers shall pay a license of $ 15.00.

59 — OILS, WHOLESALE — Each person, firm, or corporation dealing in lubricating, illuminating, fuel gasoline, benzol, benzol products, linseed or turpentine oils, one or more, shall pay a license of 3/80 of 1% of gross receipts less returned goods for the year next preceding the current license year with a minimum license in any case of $ 60.00.

This sub-paragraph shall not be subject to the provisions of Section 5(a) of this Code.

Receipts above mentioned are to include along with the regular and ordinary receipts all deliveries made from a wholesale stock to a retail stock department, regardless of the fact that the same party owns and operates, either in whole or in part, or both, the wholesale and retail business. Receipts for such deliveries shall be deemed to be not less than at wholesale value of such oil

or products in the event there is not actual receipt. The term "gross receipts" as used in this sub-paragraph shall mean the entire receipts of said business but said term "gross receipts" shall not include Federal, State, County and Municipal taxes collected by said dealer from the purchaser of said product where the dealer is acting as agent for the governmental body in the collection of said taxes.

60 — OIL, AUTOMOBILE, RETAIL AND ANTI-FREEZE — Each person, firm or corporation selling automobile oils or anti-freeze at retail, other than where sold at a gasoline filling station, shall pay a license of 3/80 of 1% of gross receipts from the sales of such business during the year next preceding the current license year, with a minimum license for each place where such oil is sold of $ 30.00.

61 — OIL — Each person, firm or corporation selling as agent, lubricating, illuminating fuel, gasoline, benzol, benzol products or other oil products, shall pay for the privilege of engaging in such business within Jefferson County a privilege tax at the rate of $ 25.00 per annum for each truck used in said business, whether said truck be owned by such agent or not.

62 — ORE, STONE, CEMENT, SAND, LIME, SLAG, CONCRETE, GRAVEL, MORTAR, SEWER OR WATER PIPE — INCLUDING ALL BY PRODUCTS — Each person, firm, corporation or association engaged in the principal business of selling either at wholesale or retail, or both, ore, stone, cement, sand, lime, slag, concrete, gravel, mortar, sewer or water pipes, or any similar material or product, or any by-product thereof, anyone or all, shall pay a license of 1/40 of 1% of gross receipts, less adjustments and returned goods for the year next preceding the current license year, from all commodities delivered within the County from plants or places without the County, and from all commodities delivered within or without the County, and from all commodities delivered within or without the County from plants or places within the County. For the purposes of this schedule, the plural includes the singular, and a "plant" or "place" shall be deemed within the County if a part thereof lies within and a part without the County. Gross receipts shall be reduced by the amount of sales of products manufactured by the seller, if the seller has paid a privilege license for said manufacturing. The minimum license fee shall be $30.00.

63 — PEANUTS AND POPCORN — Where, as its principal business, peanuts or popcorn are prepare and sold at retail direct to the trade, where gross receipts are less than:

$ 2,000	$ 9.00
$ 2,000 and less than $ 5,000	15.00
$ 5,000 and less than $ 8,000	21.00
$ 8,000 and over	30.00

This license is to be paid in addition to all other licenses.

64 — PEANUT DEALERS — Any person, firm or corporation who engages in the business of dealing in peanuts, where this is the principal business, shall pay a license of 1/40 of 1% of the gross receipts from said business from the previous year with a minimum license of $ 30.00.

65 — PET SHOPS — Each person, firm or corporation, who operates as its principal business a pet shop, including the sale of cats, dogs, and birds, shall pay a license for each such place of $ 15.00.

66 — PIANO TUNER — Each	$ 5.00
Where organs are tuned and repaired, additional	15.00

67 — POULTRY AND EGGS, WHOLESALE — Each person, firm or corporation engaged in the business of selling poultry and eggs at wholesale but who does not .regularly maintain within the County an established place of business from which is delivered the majority of their sales, but who commonly engages in selling and delivering by motor vehicle poultry and eggs as a principal business from outside said County to a point within said County, shall pay a license of $ 37.50 on each motor vehicle used in said business. In the event gross receipts in the County exceed $ 50,000 per annum, no privilege license shall be paid on any motor vehicle used in said business but the license shall be $ 50.00 on the first $ 100,000.00 or less of gross receipts from said business for the year next preceding plus an amount equal to 1/40 of 1% of all such gross receipts in excess of $ 100,000.00.

68 — POULTRY AND EGGS, WHOLESALE — Each person, firm or corporation selling poultry and eggs at wholesale, where principal business, shall pay a license of $ 50.00 on the first $ 100,000.00 or less of gross receipts from said business for the year next preceding plus an amount equal to 1/40 of 1% on all gross receipts, from said business for the year next preceding the current license year in excess of $ 100,000.00. The above license shall apply only to those who regularly maintain within the County an established place of business from which is delivered the majority of their sales, or to those persons who maintain or store within the County a stock of poultry products or eggs, either in the shell or in dehydrated or powdered form, for delivery, sale or distribution. Where such sales are not the principal business, and total gross sales of poultry and eggs for the year next preceding were less than $ 50,000.00 the license for the selling of poultry and eggs shall be $ 15.00.

70 — PRINTING, ENGRAVING, PHOTOENGRAVING, MULTIGRAPH, MIMEOGRAPH, LINOTYPE, BOOKBINDING OR RULING — Each person, firm or corporation operating a job printing office or linotype machine with or without printing press or bookbinding, or engaged in the business of printing, engraving, photoengraving, multigraph, mimeograph, linotype, bookbinding or ruling shall pay a license of 1/40 of 1% of the gross receipts from said business from the year next preceding the current license year with a minimum license of $ 24.00.

This license to be paid in addition to the other licenses provided for in this Code where merchandise, stationery and other office supplies are sold.

71 — REPAIR SHOP — Each repair shop, or the doing of repair work, where

Only one worker	$15.00
Where 2 and less than 4 workers	30.00
Where 4 and less than 6 workers	45.00
Where 6 and less than 10 workers	60.00
Where 10 and less than 15 workers	75.00
Where 15 and over	90.00

72 — SCHOOL — Each person, firm or corporation conducting a school or course of instruction as a business other than aviation school provided for by Subsection 11 of this Code, shall pay a license for the privilege of engaging in such business as follows provided, however, this license shall not apply to public or church related schools.

Where gross receipts from said business from the previous year were less than:

$ 10,000	$ 12.50
$ 10,000 and less than $25,000	20.00
$ 25,000 and less than $60,000	30.00

$ 60,000 and less than $80,000 ..... 40.00
$ 80,000 and less than $100,000 ..... 50.00
Plus an amount equal to 1/40 of 1% of gross receipts in excess of $ 100,000.

74 — SWIMMING POOLS — Each person, firm or corporation operating a swimming pool for which an admission, or membership fee, is charged shall pay a license of $ 90.00.

75 — TAILORING — Each person, firm or corporation engaged in the principal business of tailoring, altering or renting wearing apparel, or acting as agent for same, or soliciting orders for same, whether the tailoring is done either within or without the County, shall pay a license as follows: Where the gross receipts from the previous year
Were less than $5,000 ..... $15.00
$ 5,000 and less than $ 10,000 ..... 25.00
$ 10,000 and less than $ 15,000 ..... 37.50
$ 15,000 and less than $ 20,000 ..... 50.00
Plus an amount equal to 1/40 of 1% of gross receipts in excess of $ 20,000.

76 — TAXICABS — Each person, firm or corporation operating automobiles or motor vehicles commonly called and known as taxicabs (but not including jitneys and regularly established inter-urban bus lines), for each vehicle so operated $ 15.00.

77 — TREE PRUNING AND TREE SURGERY — Each person, firm or corporation engaged in doing tree pruning or tree surgery:
Where only one worker ..... $ 15.00
Where 2 or less than 4 workers 30.00
Where 4 or less than 6 workers 45.00
6 workers and over 60.00

78 — UNDERTAKERS — Each person, firm or corporation engaged in the business of undertaking, shall pay where gross annual business is less
Than $ 100,000 ..... $100.00
And for each $ 50,000 or fractional part
thereof in excess of $ 100,000 ..... $ 30.00

80 — WATCHMAKER AND REPAIR — Each person, firm, or corporation repairing watches, or operating as a watchmaker, or an employee thereof, shall pay a license of $ 15.00 for each person or employee so engaged.

83 — WINDOWS, HOUSE CLEANING AND/OR JANITORIAL SERVICE — Each person, firm or corporation engaged in the business of cleaning windows, house cleaning and/or janitorial services for the public shall pay a license for each employee or person so engaged, as follows:
Where only one worker $15.00
2 workers and less than 4 workers 30.00
4 workers and less than 6 workers 45.00
6 workers and less than 10 workers 60.00
10 workers and less than 15 workers 75.00
15 workers and over 90.00

87 — WAREHOUSE

(a) Each person, firm, or corporation engaging in warehousing other than cold storage warehousing, shall pay a license as follows: Where total floor space in said warehouse is 20,000 square feet or less $45.00

(b) An additional license fee of 3/20 of one cent per square foot shall be paid for any footage in excess of 20,000 feet.

(c) This Subsection 87 and Subsection 88 below shall be the sole applicable and governing provision of the License Code of Jefferson County under which licenses

are required and license fees are imposed for a cooperative grocers association which maintains a warehouse whether cold storage or otherwise, for the purpose of distributing groceries to member retail stores.

88 — WAREHOUSE, COLD STORAGE

(a) Each person, firm or corporation in cold storage warehousing shall pay a license fee as follows: Where total space in said warehouse is less than 100,000 cubic feet $30.00.

(b) And for each additional 100,000 cubic feet or fraction part thereof, an additional license of $30.00 shall be paid.

(c) This Subsection 88 and Subsection 87 above shall be the sole applicable and governing provisions of the License Code of Jefferson County under which licenses are required and license fees are imposed for a cooperative grocers association which maintains a warehouse whether cold storage or otherwise, for the purpose of distributing groceries to member retail grocery stores.

89 — REAL ESTATE SALESMEN — Each person employed as a real estate salesman licensed under the provisions of Title 34-27-30, et seq., shall pay an annual license amount of $25.00.

90 — INSURANCE AGENTS — Each person, firm or corporation engaged in the business of acting as agent for fire and marine insurance companies shall pay a license of 1/40 of 1% of the gross commission from said business from the previous year with a minimum license of $7.50.

SECTION 3: That the Director of Revenue shall cause to be printed and bound copies of this Code for the use of Jefferson County and he shall supervise the publication

of said Code and he shall read all of the proofs, correct all manifest errors and compare the printed book with this ordinance.

SECTION 4: (a) The term "person" as used in this Code shall include an individual, a corporation, a partnership, an association, a stock company, a business trust, an unincorporated organization, and any other entity.

(b) In all cases where the amount of license tax is dependent upon the amount of business done, amount of sales, receipts, value of furniture and other equipment, stock, capital invested, number of helpers or employees, amount of space occupied, or any factor or factors whatsoever either of the same kind as the foregoing enumerations or of a different kind therefrom, it shall be the duty of the person subject to such tax to render to the Director of Revenue, on or prior to the date when such tax becomes due, a sworn statement showing the total business done, amount of sales, receipts, stock, value of furniture and other equipment, capital invested, number of helpers or employees, amount of space occupied, or other factor or factors herein above mentioned, one or several, as the case may require for the ascertainment of the classification of such person for license taxation purposes and the correct amount of license tax to which he is subject.

(c) Upon receipt of license tax based upon the classification of such person as shown by such sworn statement, the Director of Revenue shall issue appropriate license, but the issuance and grant thereof is expressly conditional upon the truth and accuracy of such sworn statement and the same shall be revocable by the Commission of Jefferson County as inadvertently and mistakenly granted and issued whenever it shall be made to satisfactorily appear to said Commission that the said

sworn statement is false or incorrect or that the holder of such license has not paid to the Jefferson County Commission the correct amount of license tax.

(d) Upon demand by the Director of Revenue, or his authorized deputy, auditor or representative, it shall be the duty of any person holding a license from Jefferson County to throw open to said Director or his authorized deputy, auditor or representative, during the business hours, all portions of his place or places of business for the purpose of enabling said Director of Revenue, or his authorized deputy, auditor or representative, to ascertain and gain such information as may be necessary or convenient for determination of the proper classification of such license holder for license taxation purposes and determination of the correct amount of license tax to which such person is subject, and, upon demand by the Director of Revenue, or his authorized deputy, auditor or representative, it shall also be the duty of any person holding a license from the County to furnish such Director of Revenue or his authorized deputy, auditor or representative, all such information as may be required for determination of the proper classification of such license holder for license taxation purposes and determination of the correct amount of license tax to which such person is subject, and to that end it shall be the duty of such person to submit to the Director of Revenue, or his authorized deputy, auditor or representative, for inspection and examination, during reasonable business hours, at such person's place of business, in the County, all books of account, invoices, papers, reports, and memoranda containing entries showing amount of purchases, sales receipts, inventory and other information from which the correct license tax classification of such person may be ascertained and the correct amount of license tax to which he is subject be determined including exhibition of bank deposit books, and bank statements, copies of

Sales Tax Reports to the State of Alabama and Jefferson County, copies of Alabama Income Tax Reports and Federal Income Tax Reports. It shall be unlawful for any license holder, or for any servant, agent or employee of such license holder, to fail or refuse to perform any duty herein imposed upon such license holder, or to obstruct or interfere with the Director of Revenue, or his authorized deputy, auditor, or representative, in obtaining information necessary or convenient for determination of the proper license classification of such license holder.

(e) Where the amount of license required to be paid for engaging in any business is graduated according to the amount of business, or the amount of gross receipts, gross purchases, gross sales, or according to the amount or value of stock on hand, and where a maximum flat sum which shall be paid as a license is provided for engaging in such business, any person engaging in such business shall be liable for the maximum license provided for engaging in such business, unless he has in his possession the records, books, papers, and reports necessary to determine the classification to which he belongs, and unless he exhibits the same for inspection as required by this section, and unless the same disclose that the person belongs in a classification lower than the classification required to pay the maximum license. Where the amount of license required to be paid for engaging in any business is graduated according to the amount of business, or the amount of gross receipts, gross purchases, gross sales, or according to the amount of value of stock on hand, and where no maximum flat sum which shall be paid for engaging in such business is provided for, then in such event if the holder of a license of the County has not in his possession or under his control in Jefferson County true and intelligible books of accounts, invoices, papers, reports or memoranda correctly reflecting the data and information necessary for deter-

mination of the classification to which he belongs for assessment of the correct amount of license tax, or if, having in his possession or under his control such books, invoices, papers, reports and/or memoranda, he shall fail or refuse to submit and exhibit the same for inspection and examination as required by this section, or if he shall fail or refuse to throw open any portion of his place or places of business to the Director of Revenue, or his authorized deputy, auditor or representative, as in this section requires, then and in either of said events it shall be the duty of the Director of Revenue to ascertain the license tax classification of such person from the best information and data obtainable and to assess against any such person the correct license tax according to the classification thus ascertained. When the classification of such person, and the amount of license tax due from him shall have been ascertained and fixed by the Director of Revenue, it shall be the duty of such Director to mail to such person notice of his determination and to demand of such person immediate payment of the amount of tax ascertained to be due from him plus penalties but less any amount such person may have theretofore paid upon the tax due from him. If the amount of tax demanded be not paid within ten days of the mailing of such demand the Director of Revenue shall notify such person by registered mail that at a time and place specified in said notice, he will apply to the Commission of Jefferson County for revocation of such person's license. At the time and place so specified such person may appear before the Commission in person and by counsel, one or both, and show cause, if any there be, why said license should not be revoked. Upon any such hearing, and for all other purposes, the decision and determination of the Director of Revenue as to classification and amount of license tax due shall be deemed cor-

rect and final, unless and until it shall be satisfactorily shown that such decision and determination is incorrect.

(f) It shall be unlawful for any person connected with the administration of this section to divulge any information obtained by him in the course of inspection and examination of the books, papers, reports and memoranda of the taxpayer made pursuant to the provision of this exception, except to the Jefferson County Commission, the Director of Revenue, the County Attorney, or others connected with the administration of this section.

(g) It shall be the right and duty of the Director of Revenue, his deputy or inspector to inspect from time to time during reasonable business hours all records, books and other papers or documents, as well as merchandise itself that is placed or stored in public warehouses in the County as well as all other places where merchandise is stored for or by some person, firm or corporation, said information obtained from such inspection and investigation to be used as an aid in determining the proper classification of the owner of said merchandise for license taxation and for fixing the amount of such license tax, and it shall be unlawful for any person, firm or corporation to impede, hinder or obstruct the Director of Revenue or his deputy or inspector in reasonable performance of his duty.

(h) For the purpose of enabling the Director of Revenue to determine (1) whether or not there is any liability for payment of a license tax, (2) the proper classification, or (3) the correct amount of license tax due, it shall be the duty of any person engaged in or carrying on any business, vocation, occupation or profession in the County, upon demand of the Director of Revenue, his authorized deputy, auditor or representative, to permit inspection during business hours of all portions of his place or places of business, to furnish by sworn statement or otherwise all information requested bearing on the

character of the business engaged in, the amount of capital invested therein, and the dollar amount of the business transacted, and to make available for inspection and examination during business hours all books of accounts, invoices, papers, reports and memoranda relating to said business, or showing the amount of purchases, sales, receipts, inventory, and such other information necessary for a determination of tax liability, classification or amount of tax, as may be demanded, including bank deposit books, bank statements, copies of sales tax reports to the State of Alabama and Jefferson County and of state and federal income tax returns. The above records shall be maintained for the three preceding calendar years prior to such examination. It shall be unlawful for any such person, or for any agent, servant or employee of such person, to fail or refuse to perform any duty herein imposed upon such person or obstruct or interfere with the Director of Revenue, his authorized deputy, auditor or representative in carrying out the purpose of this subsection. Each day's failure or refusal to perform any duty herein imposed shall constitute a separate offense.

Section 5: (a): Where the amount of the license is based on gross annual business, gross annual receipts, gross receipts, gross sales or any other words of similar import, the terms gross annual business, gross annual receipts, gross receipts, gross sales or any other words of similar import, unless the contrary clearly appears, shall mean the entire receipts for the preceding calendar year of the business, vocation, occupation or profession engaged in, including all receipts from sales regardless of the place where the sale was solicited or placed where the contract of sale was consummated or the place of delivery, and shall include the amount of any federal excise tax, or any other tax imposed on sales or services, there may be deducted therefrom the amounts of all state,

county and municipal sales and use taxes, and also, there may be deducted therefrom the amounts of any taxes collected and paid over to the State, County or Municipality. Provided however, such gross annual business, gross annual receipts, gross receipts, gross sales shall exclude receipts from sales with delivery being made outside of the State of Alabama. Provided further that if the person, firm or corporation liable for a license under this Code, may at his or its option (1) deduct from the entire receipts the amount of receipts that were derived from the sale of merchandise or services covered by state and county license or licenses issued under Title 40, Chapter 12, Code of Alabama 1975, or (2) deduct from the amount of the license due under this Code one-half (1/2) the amount or amounts paid to the State and County for the licenses; excluding fees, interest and penalties; issued under Title 40, Chapter 12, Code of Alabama 1975. Provided further that any person, firm or corporation liable for a license under this Code regardless of whether the license is based on gross receipts or otherwise may deduct from the license due under this Code one-half (1/2) the amount or amounts paid to the State and County for licenses excluding fees, interest and penalties issued under Title 40, Chapter 12, Code of Alabama 1975 as amended.

(b) Where the amount of license is based upon the volume of receipts, or investment in inventory, plant, equipment, fixtures, rolling stock, etc., in the absence of any other specific provision therefor, the receipts or average investment referred to are those of such business for the calendar year next preceding the current license year, provided, however, that if said business did not operate the entire next preceding calendar year, then the license tax shall be based upon that amount which bears the same relationship to the actual amount of receipts or investments during such preceding part year as the en-

tire calendar year bears to such time which said business was operated during such preceding part year, and provided further that if the operation of such business did not commence until after December 31, 1988, or by subsequent December 31, then the license tax shall be based upon that amount which bears the same relationship to the actual amount of receipts or investments during such preceding part year as a 12 month period bears to such time which said business was operated during such preceding part year, and provided further, that if the operation of such business did not commence until after the 1st day of October, 1989, or any subsequent October 1, the operator thereof shall pay the minimum license for that license year, if the operation of the business does not begin until after April 1, 1990 or any subsequent April 1, the operator thereof shall pay one-half the minimum license for the remainder of the license year.

(c) Where the amount of license is based upon the average number of employees employed in the business during the calendar year next preceding the current license year and the operation of such business did not commence until the 1st day of such current year or thereafter, then the license tax for such business for such current license year shall be paid based on an affidavit given by the operator of such business, such affidavit shall state the average number of employees to be employed in the business during the current year.

Section 6: POWER TO CHANGE LICENSE: The adoption of this schedule of licenses shall not abridge the right of the Jefferson County Commission to change, alter, increase, decrease or revoke any of the above licenses at any time. And when any increase is made unless the same is paid in thirty days, the license shall be revoked and no further business carried on thereunder, nor shall it abridge the right of the Jefferson County

Commission to require a license for any business, vocation, occupation, traffic, calling or profession not included in the above schedule. The Jefferson County Commission may decrease or revise any license retroactive to October 1, of any fiscal year, if in the opinion of said Commission, said schedule is unfair or unjust.

Section 8: TERMS FOR WHICH LICENSE ISSUED: The amount of the license due hereunder by any one upon commencing business, shall not be affected or decreased by the subsequent abandonment or discontinuance of such business.

Section 9: LICENSE DEEMED A PERSONAL PRIVILEGE: (a) Every license shall be held to confer a personal privilege to transact the business, employment or profession which may be the subject of the license, and shall not be exercised except by the person, firm, or corporation licensed, unless specifically authorized by law to do so. (b) A business or privilege for which such license is issued is, under actual sale, transferred to a new ownership in which case a transfer of license may be effected by application to the Director of Revenue and the payment of a fee of One Dollar ($1.00). No transfer shall be valid until same has been endorsed across the face of the license receipt by the Director of Revenue.

Section 10: SALARIED PROFESSIONAL EMPLOYEES: When any person claims any concession on any kind of professional license provided for in this Code because of such person being either the employer or the employee, such person shall not be exempt from payment of the license provided in this Code, until both the employer and the employee have furnished to the Director of Revenue, sworn affidavits or other evidence satisfactory to the Director, setting out all the facts and conditions in regard to the employment with such facts and

conditions being as would ordinarily substantiate the employment claim.

Section 11: PLACE OF BUSINESS TO BE DESIGNATED: Any person desiring to engage in any trade, business, vocation, occupation, profession, for which a license is required and for which a fixed place of business is required shall designate the place at which said trade, business, vocation, occupation or profession is to be carried on, and the license to be issued thereunder, shall designate such place and such license shall authorize the carrying on of such trade, business, vocation, or profession only at such place. For each place at which said trade, business, vocation, occupation or profession is carried on, a separate license fee and tax shall be paid.

Section 12: EACH BUSINESS DEMANDS SEPARATE LICENSE: Any person, firm or corporation dealing in two or more of the articles or engaging in two or more of the businesses, vocations, occupations, callings or professions enumerated in Section 2 of this Code and for which a license is required of each, such person shall pay for and take out a license for each line of business, vocation, occupation, calling or profession, except as otherwise provided herein.

Section 13: PAYMENT OF LICENSE BY CHECK: Whenever a license or license receipt shall be issued in return for any check, the same shall not be valid or of any force or effect unless such check shall be duly paid upon presentation to the drawee.

Section 14: LICENSE TO BE EXHIBITED: Each license shall be posted in a conspicuous place, where such business, vocation, occupation or profession is carried on, and the holder of such license shall immediately show such license to the Director of Revenue, or his

deputy, or any law enforcement officer of the County upon being so requested by such Director, deputy or officer so to do.

Section 15: All licenses under this Code shall be due and payable on the first day of October, 1989, for the County fiscal year, or from the day on which business is commenced if after October 1, 1989, for the remainder of the fiscal year and on October 1, for each subsequent County fiscal year. The payment for the fiscal year shall be delinquent on November 1, 1989 and each November 1, thereafter for subsequent fiscal years. If said licenses are not paid before becoming delinquent a penalty shall be collected in an amount equal to 15% of the license due for such period, and also a citation fee of $1.50 for each license listed on the citation and served on a delinquent. But the payment of any and all licenses due may be enforced immediately after the due date thereof. The Director of Revenue shall have the authority to waive delinquent penalty and interest for a good and sufficient cause shown.

Section 16: No provision of this Code shall be applied: (a) so as to impose any unlawful tax or unlawful burden on interstate commerce or on activity of the State or Federal governments; or (b) in any manner which is repugnant to or violates any provision of the United States or Alabama constitutions. Nor shall the provisions of this Code apply to any business, vocation, occupation, calling or profession which has been specifically exempted under Act 406 as passed in the 1967 Regular Session of the Legislature and approved by the Governor on September 7, 1967.

Section 17: PROVISIONS SEPARABLE AS TO INDIVIDUALITY, ETC.: Should any section or provision of

this Code be for any reason held void or invalid, it shall not affect the validity of any other section or provision hereof which is not itself void or invalid.

Section 18: UNLAWFUL TO DO BUSINESS BEFORE OBTAINING LICENSE: It shall be unlawful for any person to engage in any business or vocation in the County without first having procured a license therefor, and each day during which said business or occupation is so engaged in shall constitute a separate offense.

Section 19: (a) Any lawful license issued to any person, firm or corporation to conduct any business shall be subject to revocation by the Jefferson County Commission for the violation by the licensee, his agent, servant, or employee, of any provision of this Code or of any ordinance of the County, or of any statute of the State of Alabama, relating to the business for which such license is issued: and shall also be subject to revocation by the Commission if the licensee, his agent, servant, or employee under color of such license violates or aids or abets in violating or knowingly permits or suffers to be violated any penal ordinance of the County or any criminal law of the State of Alabama; and shall also be subject to revocation by the Jefferson County Commission if, in connection with the issuance or renewal of any license, the licensee or his agent filed any application, affidavit, statement, or other document containing any untrue or misleading statement or omission of a material fact.

(b) The conditions hereinabove set forth as grounds for the revocation of a license shall constitute grounds for the Jefferson County Commission refusing to renew a license.

(c) The Commission shall set a time for hearing on the matter of revoking or refusing to renew a license; and a notice of such hearing shall be given to the licensee, or

the applicant for renewal, as the case may be, at least one day before the day set for said hearing. At the hearing the Jefferson County Commission shall hear all evidence offered by any party and all evidence that may be presented bearing upon the question of revocation or the refusal of renewal, as the case may be.

Section 20: FALSE OATH TO PROCURE LICENSE: It shall be unlawful for any person to give, submit, exhibit or present to the County, the Director of Revenue, or to any license inspector or collector of the County, any false, deceptive or misleading statement, affidavit, certificate, book or record entry, or other document relating to the amount of capital invested, the value of goods, stocks, or merchandise, the amounts or volume of sales, receipts or commissions, the number of employees, the number of vehicles used, or any other data, record of information required by the License Code of the County to determine the amount of license due.

Section 21: Any person liable for any license hereunder who neglects or refuses to pay the same, the amount thereof, including penalty, together with any cost which may accrue in addition thereto shall be a lien in favor of Jefferson County, Alabama, upon all property and the rights to property, real or personal, belonging to such person. Such lien shall not be valid against any mortgagee, purchaser in the usual course of trade or conventional judgment creditor with an actual money judgment or a decree of some Court of Law or Equity until after the time a notice of such lien has been filed by the Director of Revenue in the Office of the Judge of Probate of the County in which such property, real or personal, is located.

Section 22: REFUNDS, ADDITIONAL LICENSES: (a) Any person who by mistake of fact or law has paid to the Director of Revenue money that was not due from him for a license or an amount in excess of that required by law for the business, vocation, occupation or profession to be carried on by such person under the license, shall be entitled to have refunded the money incorrectly paid, less the issuance fee and any commission which may he retained by the Director of Revenue.

(b) Such application for refund must be made within two years from the date of such erroneous or excessive payment.

(c) In case of the issuance of a license for less than the amount due therefor upon payment of the additional amount due for such license an additional license may be issued in such manner as to allow credit for the amount previously paid by the licensee and there shall be endorsed on the face of such additional license the words "additional to license #_____.

Section 23: DISPOSITION OF MONIES BY DIRECTOR OF REVENUE: Within twenty days after the end of each month the Director of Revenue must remit to the County Treasurer all the money received by him for licenses.

Section 24: Any person violating any provision of this Code shall upon conviction be punished within the limits of and as provided by law.

Section 25: This License Code of Jefferson County, Alabama, shall become effective as a law and ordinance of Jefferson County on October 1, 1989, following its adoption and approval by Ordinance of the Jefferson County Commission.

CODE OF ALABAMA 1975

TITLE 11
COUNTIES AND MUNICIPAL CORPORATIONS

CHAPTER 51
TAXATION

ARTICLE 2
LICENSE TAXES

§ 11-51-90. Licensing of conduct of trade, business, profession, etc., in municipality authorized generally; licensing as to persons, etc., engaged in business in connection with interstate commerce; purposes for which licensing power conferred by division may be exercised.

(a) Municipalities shall have the following powers:

(1) To license any exhibition, trade, business, vocation, occupation, or profession not prohibited by the Constitution or laws of the state which may be engaged in or carried on in the city or town.

(2) To fix the amount of licenses, the time for which they are to run, not exceeding one year, to provide a penalty for doing business without a license, and to charge a fee of not exceeding five dollars ($5) for issuing each license.

(3) To require sworn statements as to the amount of capital invested, value of goods or stocks, or amounts of sales or receipts where the amount of the license is made to depend upon the amount of capital invested, value of goods or stocks, or amount of sales or receipts and to punish any person or corporation for failure or refusal to furnish sworn statements or for giving of false statements in relation thereto.

(b) The license authorized by subsection (a) of this section as to persons, firms, or corporations engaged in business in connection with interstate commerce shall be confined to that portion within the limits of the state and where the person, firm, or corporation has an office or transacts business in the city or town imposing the license.

(c) The power to license conferred by this division may be used in the exercise of the police power as well as for the purpose of raising revenue, or both. (Code 1907, § 1339; Acts 1909, No. 121, p. 121; Code 1923, § 2154; Code 1940, T. 37, § 735; Acts 1994, No. 94-644, § 1).

CITY OF BIRMINGHAM, ALABAMA

ORDINANCE NO. 70-75

AN ORDINANCE TO PROVIDE FOR AN OCCUPATIONAL LICENSE FEE FOR PERSONS ENGAGED IN TRADES, OCCUPATIONS AND PROFESSIONS, AND THE METHOD OF REPORTING AND COLLECTING THE SAME.

BE IT ORDAINED By the Council of the City of Birmingham, Alabama, as follows:

Section 1. DEFINITIONS. That the following words, when used in this ordinance, shall have the meaning ascribed to them, except where the context clearly indicates or requires a different meaning:

(a) The word "Person" shall mean any natural person. Whenever the word "Person" is used in any clause prescribing and imposing a penalty in the nature of a fine or imprisonment, the word as applied to a partnership or other form of unincorporated enterprise shall mean the partners or members thereof, and as applied to corporations shall mean the officers and directors thereof.

(b) The words "Trade, Occupation and Profession" shall mean and include the doing of any kind of work, the rendering of any kind of personal services, or the holding of any kind of position or job within the City of Birmingham, Alabama, by any clerk, laborer, tradesman, manager, official or other employee, including any nonresident of the City of Birmingham who is employed by any employer as defined in this section, where the relationship between the individual performing the services and the person for whom such services are rendered is, as to those services, the legal relationship of employer

and employee, including also a partner of a firm or an officer of a firm or corporation, if such partner or officer receives a salary for his personal services rendered in the business of such firm or corporation, but they shall not mean or include domestic servants employed in private homes or businesses, professions or occupations for which license fees are required to be paid under any General License Code of the City.

(c) The words "Trade, Occupations and Professions" shall also mean and include the holding of any kind of office or position, either by election or appointment, by any federal, state, county or city Officer or employee where the services of such official or employee are rendered within the City of Birmingham.

(d) The word "Employee" shall mean and include any person engaging in or following any trade, occupation or profession within the meaning of subsection (b) of Section 1 of this ordinance.

(e) The word "Employer" shall mean and include any person, business, firm, corporation, partnership, association or any other kind of organization who or that employs any person in any trade, occupation or profession in the City of Birmingham within the meaning of subsection (b) of Section 1 of this ordinance.

(f) The words "Gross Receipts" and "Compensation" shall have the same meaning, and both words shall mean and include but not be limited to the total of the following items which a person receives from or is entitled to receive from or be given credit for by his employer for any work done or personal services rendered in any trade, occupation or profession, including any kind of deductions before "Take Home" pay is received:

Cash Compensation	**Non-Cash Compensation**
Salary	Reimbursements for expenses above actually incurred
Wages	
Bonuses	Value of Personal Use of Company Owned Vehicle
Incentive Pay	Value of Personal Use of Clubs
Overtime Pay	Cost of more than $50,000 group life insurance
Commissions	Non-Deminimus Awards in excess of $100.00
Severance Pay	

The words "Gross Receipts" and "Compensation" shall also include the amount which an employee elects to defer pursuant to a salary reduction agreement under a retirement plan or deferral arrangement (including but not limited to 26 United States Code Sections 401(k) or 403(b) plans, but not Section 125 Cafeteria Plans).

The words "Gross Receipts" and "Compensation" shall not include the following items:

Employer Paid Insurance
Educational Assistance
Employee Discounts
Stock Options
Stock Grants Subject to a Substantial Risk of Forfeiture under 26 United States Code Section 83
Retirement Pay
Distributions from Qualified Pension, Profit Sharing, Thrift, Stock Bonus, and Other Deferred Compensation Plans Qualified under 26 United States Code Section 401(a)
Distributions form Non-Qualified Deferred Compensation Plans
Section 125 Cafeteria Plans
Dependent Child Care Assistance
Payment of Parking by Employer
Students Grant/Scholarships
Death Benefits
Unemployment Compensation

Expenses incurred in moving Employer Contributions to NonQualified Deferred Compensation Plans
Employer Contributions to Qualified Pension, Profit Sharing, Thrift, Stock Bonus and Other Deferred Compensation Plans Qualified under 26 United States Code Section 401(a)
Strike Benefits
Workmen's Compensation
Actural Expenses Incurred in the Employer's Behalf

(subsection (f) of section 1 amended by Ord. No. 92-280 adopted November 03, 1992)

(g) The word "Licensee" shall mean and include any person required to file a return or to pay a license fee under this ordinance.

(h) The word "City" shall mean the City of Birmingham, Alabama.

(i) The words "Director of Finance" shall mean the Director of Finance of the City of Birmingham.

(j) The singular shall include the plural and vice versa, and the masculine shall include the feminine and the neuter.

Section 2. LICENSE FEES REQUIRED. It shall be unlawful for any person to engage in or follow any trade, occupation or profession as defined in Section 1 within the City on and after the 1st day of December, 1970 without paying license fees for the privilege of engaging in or following such trade, occupation or profession, which license fees shall be measured by one per centum (1%) of the gross receipts of each such person.

Section 3. WHERE WORK DONE OR SERVICES PERFORMED BOTH WITHIN AND/WITHOUT THE CITY. In cases where compensation is earned as a result of work done or services performed both within and

without the city, the license fees required under this ordinance shall be computed by determining upon the oath of the employer, or if required by the Director of Finance upon the oath of the employee, that percentage of the compensation earned from the proportion of the work which was done or performed within the City.

Section 4. EMPLOYERS TO WITHHOLD LICENSE FEES AND FILE RETURNS. Each employer shall deduct from each payment due each employee the amount of the license fees measured by one per centum (1%) of the compensation due each employee beginning on the 1st day of December, 1970. The payments required to be made on account of such deductions by employers shall be made monthly to the City for the monthly periods ending January 31, February 28, March 31, April 30, May 31, June 30, July 31, August 31, September 30, October 31, November 30, and December 31st of each year, on or before the twentieth day of the, month next following the end of each such monthly period, and each employer shall at the same time make a return in connection therewith on a form made available to such employer by the Director of Finance at the office of the Director of Finance, provided that, if the total amount deducted from payments made to or due all employees of an employer is less than fifty (50.00) dollars during each calendar month of the previous calendar year, then such employer may elect, for the current calendar year, to remit such deductions to the City for the quarterly periods ending March 31st, June 30th, September 30th and December 31st of such following calendar year, on or before the twentieth day of the month next following the end of each such quarterly period, and each such employer shall at the same time make a return in connection therewith on a form made available to such employer by the Director of Finance at the office of the Director of Fi-

nance. Provided, however, that the failure or omission by any employer to deduct such license fees shall not relieve an employee from the payment of such license fees and compliance with the requirements for making returns as provided in this Ordinance, or with any regulations promulgated under this Ordinance. Each employer shall file in the office of the Director of Finance on or before January 31, 1971, a return on a form made available by said Director of Finance, at the office of said Director of Finance, which return shall show the gross amount of compensation of each employee, the amount of license fees deducted and paid by such employer for all or any part of the period from and including December 1, 1970, and the last known address of each such employee, and, on or before January 31st of each year thereafter a return showing the gross amount of compensation of each employee and the amount of the license fees deducted and paid by the employer, during all or any part of the preceding calendar year. Each employer shall keep accurate records of all such compensation, deductions, license fees, payments and returns. Such records shall be kept and maintained by each such employer for not less than (5) years subsequent to the date such compensation was earned.

Section 5. RETURNS TO BE FILED BY EMPLOYEES. When a monthly or quarterly return, as required by Section 4 hereof is not filed by an employer and the license fees are not paid to the City by such employer monthly as herein provided, the employee for whom no return has been filed and no payment has been made shall file a return with the Director of Finance on or before the 1st day of the second month next following the end of each such monthly or quarterly period, showing in said return his gross receipts subject to license fees for such month or quarter, and he shall also file a return with the Director of Finance on or before January 31st of each year thereafter in which his employer has failed to file any monthly or quarterly return required in the preceding calendar year, showing on said return the gross receipts subject to license fees during the preceding calendar year. If for any reason all license fees of a person subject to the provisions of this Ordinance were not withheld by his employer from his gross receipts, such person shall file each return required by this Section on a form obtainable at the office of the Director of Finance. In addition to the gross receipts earned by him, such return shall show such other pertinent information as may be required by the Director of Finance. Each person making a return required by the Section shall, at the time of filing thereof, pay to the City the amount of license fees due under this Ordinance; provided, however, that any portion of the license fees deducted at the source shall be deducted on the return and only the balance, if any, shall be due and payable at the time of filing said return. Each employee shall keep accurate records of all such compensation, deductions, license fees, payments and returns. Such records shall be kept and maintained by each such employee for not less than five (5) years subsequent to the date such compensation was earned.

Section 6. DUTIES OF THE DIRECTOR OF FINANCE. It shall be the duty of the Director of Finance to collect and receive all license fees imposed by this ordinance and to keep records showing the amounts received by him from each employer. All moneys received by the Director of Finance shall be deposited in a duly approved depository and credited to the General Fund of the City of Birmingham, Alabama. The Director of Finance shall prescribe printed forms for use by persons subject to the provisions of this ordinance and shall make such forms available at his office for use by such person.

Section 7. INVESTIGATIVE POWERS OF THE DIRECTOR OF FINANCE. The Director of Finance or any agent or employee designated by him is hereby authorized to examine the books, papers and records of any employer or supposed employer, or of any licensee or supposed licensee, in order to determine the accuracy of any return made, or if no return was made to ascertain the amount of license fees due under the terms of this ordinance by such examination. Each such employer or supposed employer or licensee or supposed licensee shall give to the Director of Finance, or to his duly authorized agent or employee, the means, facilities and opportunity for the making of such examination and investigation. The Director of Finance is hereby authorized to examine any person under oath concerning any gross receipts which were or should have been shown in a return, and to this end he may compel the production of books, papers, records and the attendance of all persons before him, whether as parties or as witnesses, whom he believes to have knowledge of such gross receipts or compensation.

Section 8. REGULATIONS MAY BE PROMULGATED. The Director of Finance may prescribe, adopt, promulgate and enforce reasonable rules and regulations not in conflict with this ordinance relating to any matter or thing pertaining to the administration and enforcement of the provisions of this ordinance, including but not limited to provisions for the re-examination and correction of returns as to which overpayment or underpayment is claimed or found to have been made, and the regulations so promulgated shall be binding upon all licensees and employers.

Section 9. INFORMATION TO BE CONFIDENTIAL. Notwithstanding any ordinances to the contrary, any information gained by the Director of Finance or any other official or agent or employee of the City as a result of any returns, investigations, hearings or verifications required or authorized by this ordinance shall be confidential, except for official purposes, or in accordance with proper judicial order, or the enforcement of this ordinance, and any person or agent divulging such information, except as herein permitted, shall upon conviction be subject to a fine of not more that $100 or to imprisonment of not exceeding thirty (30) days, or to both such fine and imprisonment.

Section 10. INTEREST AND PENALTIES

(a) All license fees imposed by this ordinance which are delinquent, that is, which remain unpaid after they become due shall, subject to the provisions hereinafter set out, bear interest at the rate of twelve percentum (12%) per annum, and any person who has failed to pay such license fees when the same became due shall, subject to the provisions hereinafter set out, also be charged a penalty of ten percentum (10%) of the amount of such unpaid license fees. Any person or employer who fails or refuses to withhold any license fees payable under this ordinance, or who fails to pay such fees after withholding the same to the City at the time it is due, as provided under the provisions of Section 4 hereof, shall become liable to the City for such fees, as well as for the interest thereon at the rate of twelve percentum (12 %) per annum, and for the aforesaid penalty. Provided, however, that the minimum penalty imposed against such person or employer shall be Three Dollars ($3.00). Provided the Director of Finance, if a good and sufficient reason is shown for the failure to pay the tax within the time required, may waive or remit the penalty and interest, or a portion of either, upon payment of the tax due.

(b) Any person or employee who shall fail, neglect or refuse to pay a license fee as by this ordinance required, or any employer who shall fail to withhold said license fees, or to pay over to City such license fees, penalties or interest imposed by this ordinance, or any person required to file a return under the provisions of Section 5 of this ordinance, who shall fail, neglect or refuse to file such return, or any person or employer who shall refuse to permit the Director of Finance or any agent or employee designated by him, in writing, to examine his books, records and papers for any purpose authorized by this ordinance, or who shall knowingly make any incomplete, false or fraudulent return, or who shall attempt to do anything whatever to avoid the full disclosure of the amount of gross receipts or compensation in order to avoid the payment of the whole or any part of a license fee, shall upon conviction be subject to punishment within the limits of and as provided by Section 1-6 of the General Code of the City of Birmingham, 1964, for each offense. Such punishment shall be in addition to the penalties imposed under subsection (a) of this section. (Subsection (b) of Section 10 amended by Ord. No. 73-77 adopted June 12,1973.)

Section 11. EXTENSION OF TIME FOR MAKING RETURN. The Director of Finance, for good cause, may extend the time for making any return required under the provisions of this ordinance, but the time for filing any such return shall not be extended for a greater period than thirty (30) days from the day such return is due to be made and shall not prevent penalty and interest from accruing during the period of such extension.

Section 12. USE OF LICENSE FEES. All money derived from license fees under the provisions of this ordinance shall be paid to City and placed to the credit of the General Fund of the City of Birmingham, and shall be used and expended as authorized by law.

Section 13. SEVERABILITY. The provisions of this ordinance are severable. If any provision, section, paragraph, sentence or part thereof, or the application thereof to any employer or licensee or class or persons, shall be held unconstitutional or invalid, such decision shall not affect or impair the remainder of the ordinance, it being the legislative intent to ordain and enact each provision, section, paragraph, sentence and part thereof, separately and independently of each other.

Section 14. REPEAL OF ORDINANCES. All ordinances or parts of ordinances in conflict with this ordinance are to the extent of such conflict hereby repealed.

Section 15. EFFECTIVE DATE. This ordinance shall be in full force and effect on and after December 1, 1970, and from year to year thereafter, until repealed.

CITY OF BIRMINGHAM, ALABAMA

LICENSE CODE

Adopted by Ordinance No. 91-295

Section 1. The following is hereby declared to be the schedule of licenses for the calendar year commencing January 1, **1992** through January 1, **1997** for divers businesses, vocations, occupations and professions engaged in or carried on, in the City of Birmingham in said calendar year, and each and every person, firm, company or corporation engaged in any business, vocation, occupation or profession enumerated herein, in said calendar year shall pay and take out such licenses in such sums as are herein provided:

* * *

12— ARCHITECTS—

Each person, firm or corporation where gross annual business is

less than $5,000	$30.00
$5,000 and less than $10,000	50.00
$10,000 and less than $17,500	75.00
$17,500 and less than $25,000	100.00
$25,000 and less than $32,500	125.00
$32,500 and less than $40,000	150.00
$40,000 and less than $50,000	200.00
$50,000 and less than $75,000	250.00
$75,000 and less than $100,000	300.00
$100,000 and less than $125,000	350.00
$125,000 and less than $150,000	400.00
$150,000 and less than $175,000	450.00
$175,000 and less than $200,000	500.00
$200,000 and less than $250,000	550.00
$250,000 and less than $300,000	600.00

$300,000 and less than $400,000	700.00
$400,000 and less than $500,000	800.00
$500,000 and less than $600,000	900.00
$600,000 and less than $800,000	1,000.00
$800,000 and less than $1,000,000	1,200.00
$1,000,000 and less than $1,400,000	1,400.00
$1,400,000 and less than $2,000,000	1,800.00
$2,000,000 and less than $2,600,000	2,200.00
$2,600,000 and less than $3,200,000	2,400.00
$3,200,000 and over	2,500.00

14— ATTORNEYS—

(a) Each person, or where a partnership (but not including associations as defined in Subdivision (b) herein), each member of partnership, where gross professional fees from services rendered within the City of Birmingham during the year next preceding are

less than $5,000	$30.00
$5,000 and less than $10,000	50.00
$10,000 and less than $15,000	75.00
$15,000 and less than $20,000	100.00
$20,000 and less than $25,000	125.00
$25,000 and less than $30,000	150.00

Plus an amount equal to 4/10 of 1% of subject professional fees in excess of $30,000.

(b) Each professional member or associate of an unincorporated association (as defined by Act 865 of the 1961 Session of the Legislature of Alabama), where the total remuneration for services rendered within the City of Birmingham during the year next Legislature of Alabama) or a professional corporation (as defined by Act 514 of the 1983 Session of the Legislature of Alabama), where the total remuneration of services rendered within the City of Birmingham during the next year preceding are

less than $5,000 ..... $30.00
$5,000 and less than $10,000 ..... 50.00
$10,000 and less than $15,000 ..... 75.00
$15,000 and less than $20,000 ..... 100.00
$20,000 and less than $25,000 ..... 125.00
$25,000 and less than $30,000 ..... 150.00

Plus an amount equal to 4/10 of 1% of subject professional fees in excess of $30,000.

The gross remuneration of such professional member or associate, for the purpose of this section, shall be computed by dividing the gross professional fees from services rendered within the City of Birmingham of such unincorporated association by the total number of professional members or associates of such unincorporated association.

* * *

16—AUDITORS, ACCOUNTANTS AND BOOKKEEPERS—

(a) Each person, or where a partnership (but not including associations as defined in Subdivision (b) herein), each member of partnership, where gross professional fees from services rendered within the City of Birmingham during the year next preceding are
less than $5,000 ..... $30.00
$5,000 and less than $10,000 ..... 50.00
$10,000 and less than $15,000 ..... 75.00
$15,000 and less than $20,000 ..... 100.00
$20,000 and less than $25,000 ..... 125.00
$25,000 and less than $30,000 ..... 150.00

Plus an amount equal to 4/10 of 1% of subject professional fees in excess of $30,000.

(b) Each professional member or associate of an unincorporated association (as defined by Act 865 of the 1961

Session of the Legislature of Alabama), or a professional corporation (as defined by Act 514 of the 1983 Session of the Legislature of Alabama), where the total remuneration for services rendered within the City of Birmingham during the year next preceding are
less than $5,000 ..... $30.00
$5,000 and less than $10,000 ..... 50.00
$10,000 and less than $15,000 ..... 75.00
$15,000 and less than $20,000 ..... 100.00
$20,000 and less than $25,000 ..... 125.00
$25,000 and less than $30,000 ..... 150.00

Plus an amount equal to 4/10 of 1% of subject professional fees in excess of $30,000.

The gross remuneration of such professional member or associate, for the purpose of this section, shall be computed by dividing the gross professional fees from services rendered within the City of Birmingham of such unincorporated association by the total number of professional members or associates of such unincorporated association.

* * *

68— CONTRACTORS—

Each person engaged in the business of constructing houses or buildings on contact, or who constructs two or more houses a year, whether on contract or otherwise, or who maintains an office in Birmingham used in connection with such construction outside of Birmingham, shall pay a license of $100.00

69— CONTRACTORS—

Each person contracting for or engaged in the business of installing or repairing air conditioning, furnaces, making furnace repairs, doing sheet and tin metal work,

steam heating, hot water heating, and steam fitting, any one or all, where gross receipts are:

Less than $50,000	$50.00
$50,000 and less than $100,000	75.00
$100,000 and less than $200,000	100.00
$200,000 and less than $300,000	200.00
$300,000 and less than $400,000	300.00
$400,000 and less than $500,000	400.00
$500,000 and less than $600,000	500.00
$600,000 and less than $700,000	600.00
$700,000 and less than $800,000	700.00
$800,000 and less than $900,000	800.00
$900,000 and less than $1,000,000	900.00
$1,000,000 and over	1,000.00

With a minimum license of $50.00 in any case.

No license will be issued to heating and air condition contractor until applicant has obtained State of Alabama Permit.

* * *

98—ENGINEERS, CIVIL, MINING, CONSTRUCTION, ELECTRICAL, ESTIMATING, CONSULTING, INDUSTRIAL RADAR OR MECHANICAL ENGINEER OR SURVEYOR—

(a) Each Person, or where a partnership [but not including associations as defined in Subdivision (b) hereon], each member of partnership, where gross professional fees from services rendered within the City of Birmingham during the year next preceding are

less than $5,000	$30.00
$5,000 and less than $10,000	50.00
$10,000 and less than $15,000	75.00
$15,000 and less than $20,000	100.00
$20,000 and less than $25,000	125.00
$25,000 and less than $30,000	150.00

Plus an amount equal to 4/10 of 1% of those gross receipts in excess of $30,000, but in no event shall the license under this schedule be for an amount in excess of $5,000.

(b) Each professional member or associate of an unincorporated association (as defined by Act 865 of the 1961 Session of the Legislature of Alabama), or a professional corporation (as defined by Act 514 of the 1983 Session of the Legislature of Alabama), where the total remuneration for services rendered within the City of Birmingham during the year next preceding are

less than $5,000	$30.00
$5,000 and less than $10,000	50.00
$10,000 and less than $15,000	75.00
$15,000 and less than $20,000	100.00
$20,000 and less than $25,000	125.00
$25,000 and less than $30,000	150.00

Plus an amount equal to 4/10 of 1% of those subject remunerations in excess of $30,000.

The gross remuneration of such professional member or associate, for the purpose of this section, shall be computed by dividing the gross professional fees from services rendered within the City of Birmingham of such unincorporated association by the total number of professional members or associates of such unincorporated association.

* * *

186— OPTOMETRIST—

Each person, firm, corporation, association, or where a partnership, each member of partnership, where gross professional fees from services rendered within the City of Birmingham during the year next preceding are:

less than $5,000	$30.00
$5,000 and less than $10,000	50.00

$10,000 and less than $15,000 ..... 75.00
$15,000 and less than $20,000 ..... 100.00
$20,000 and less than $25,000 ..... 125.00
$25,000 and less than $30,000 ..... 150.00

Plus an amount equal to 4/10 of 1% of subject professional fees in excess of $30,000.

This license is not to include the business of manufacturing and/or grinding lenses or the selling of merchandise other than manufacturing, grinding of lenses or the selling or furnishing of merchandise by an optometrist in the exercise of his practice as an optometrist.

* * *

198—PHYSICIANS, SURGEONS, DENTISTS, PSYCHOLOGISTS, PSYCHIATRISTS, OSTEOPATHS, CHIROPRACTORS OR CHIROPODISTS—

(a) Each person, firm or corporation, or where a partnership [but not including associations as defined in subdivision (b) herein], each member thereof, where gross fees, charges or remuneration for professional services rendered or provided within the City of Birmingham during the year next preceding are:

less than $5,000 ..... $30.00
$5,000 and less than $10,000 ..... 50.00
$10,000 and less than $15,000 ..... 75.00
$15,000 and less than $20,000 ..... 100.00
$20,000 and less than $25,000 ..... 125.00
$25,000 and less than $30,000 ..... 150.00

Plus an amount equal to 4/10 of 1% of subject professional fees, charges or remuneration in excess of $30,000.

(b) Each professional member or associate of an unincorporated association (as defined by Act 865 of the 1961 Session of the Legislature of Alabama), or a professional

corporation (as defined by Act 514 of the 1983 Session of the Legislature of Alabama), where the total fees, charges or remuneration for services rendered within the City of Birmingham during the year next preceding are

less than $5,000 ..... $30.00
$5,000 and less than $10,000 ..... 50.00
$10,000 and less than $15,000 ..... 75.00
$15,000 and less than $20,000 ..... 100.00
$20,000 and less than $25,000 ..... 125.00
$25,000 and less than $30,000 ..... 150.00

Plus an amount equal to 4/10 of 1% of those subject remunerations in excess of $30,000.

The gross remuneration of such professional member or associate, for the purpose of this section, shall be computed by dividing the gross professional fees from services rendered within the City of Birmingham of such unincorporated association by the total number of professional members or associates of such unincorporated association.

* * *

246—VETERINARY SURGEON—

(a) Each person, or where a partnership (but not including associations as defined in subdivision (b) herein, each member of partnership where gross professional fees from services rendered within the City of Birmingham during the year next preceding are

less than $5,000 ..... $30.00
$5,000 and less than $10,000 ..... 50.00
$10,000 and less than $15,000 ..... 75.00
$15,000 and less than $20,000 ..... 100.00
$20,000 and less than $25,000 ..... 125.00
$25,000 and less than $30,000 ..... 150.00

Plus an amount equal to 4/10 of 1% of subject professional fees in excess of $30,000.

(b) Each professional member or associate of an unincorporated association (as defined by Act 865 of the 1961 Session of the Legislature of Alabama), or a professional corporation (as defined by Act 514 of the 1983 Session of the Legislature of Alabama), where the total remuneration for services rendered within the City of Birmingham during the year next preceding are

less than $5,000	$30.00
$5,000 and less than $10,000	50.00
$10,000 and less than $15,000	75.00
$15,000 and less than $20,000	100.00
$20,000 and less than $25,000	125.00
$25,000 and less than $30,000	150.00

Plus an amount equal to 4/10 of 1% of those subject remunerations in excess of $30,000.

The gross remuneration of such professional member or associate, for the purpose of this section, shall be computed by dividing the gross professional fees from services rendered within the City of Birmingham of such unincorporated association by the total number of professional members or associates of such unincorporated association.

* * *

NO. 95-386

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

JASON RICHARDS and FANNIE HILL,

Petitioners,

v.

JEFFERSON COUNTY, ALABAMA and BIRMINGHAM-JEFFERSON CIVIC CENTER AUTHORITY,

Respondents.

DECLARATION OF RANDY GODEKE

(i) My name is Randy Godeke, and I am over 21 years of age.

(ii) I have been employed as Director of Revenue by Respondent, Jefferson County, Alabama, since June 29, 1991. By virtue of my official position, I have personal knowledge of the facts declared herein, and I am authorized to make this declaration.

(iii) As Director of Revenue for Jefferson County, I am responsible for the collection of all tax revenues, other than property taxes, of Jefferson County, including business license and occupational taxes.

(iv) An occupational tax (the "occupational tax") is levied by Jefferson County pursuant to Ordinance No. 1120, adopted on September 29, 1987.

(v) Section 4 of Ordinance No. 1120 requires each employer whose employees are subject to the occupa-

tional tax to "file in the office of the Director of Revenue on or before January 31, of each year a return... which return shall show the gross amount of compensation of each employee, the amount of license fees deducted and paid by such employer for all or any part of the preceding calendar year. . . ."

(vi) Section 6 of Ordinance No. 1120 states that the Director of Revenue shall "keep records showing the amounts received by him from each employer."

(vii) Pursuant to Section 9 of Ordinance No. 1120, subject to certain exceptions, information regarding individual employees is required to be kept confidential. However, in the regular course of business, the Department of Revenue develops selective statistics for certain representative employers, including the total number of employees, the gross wages paid by the employer, the amount of wages upon which the occupational tax was withheld, the percentage of gross wages subject to the occupational tax, and, where applicable, the reason or reasons that certain employees of the employer were not subject to the occupational tax. Such statistics are maintained by my office in the regular course of business and are public records; they are available upon request for inspection by the public.

(viii) Attached hereto as Exhibit A to this Declaration is a compilation of statistics for the 1994 calendar year pertaining to representative employers in various categories of businesses, industries and professions. These statistics are based on the returns submitted by such employers for the 1994 calendar year, which is the latest year for which such statistics have been developed and compiled by my office. The compilation—based on the legally required returns filed by employers, as translated to public records—is incorporated in, and adopted as a part of, this Declaration.

(ix) The compilation reflected by Exhibit A presents various categories of businesses, industries and professions and representative companies or firms within each such category, identifying for each such company or firm the total number of W-2 tax returns filed for employees of such company or firm during 1994, the gross wages paid by such employer in that year, the amount of wages that were subject to the occupational tax, the percentage of the gross wages subject to the occupational tax, and a code explaining, where applicable, the reasons that the occupational tax applied to less than 100% of the gross wages paid by such company or firm.

(x) This Declaration is made under penalty of perjury.

/s/ Randy Godeke
RANDY GODEKE
Director of Revenue
Jefferson County, Alabama

EXHIBIT A
TO
DECLARATION OF RANDY GODEKE

Employer	Number of Employees	Gross Wages	Wages Subject to Occupatoinal Tax	Percentage of Wages Subject to Occupational Tax	Code
Utilities:					
Alabama Power	4051	141,883,561	117,458,798	83%	A
Energen	959	39,326,769	33,199,147	84%	B
B'ham Water Wks	661	14,171,123	12,397,014	87%	B
BellSouth Telecom	8075	44,099,229	33,110,079	75%	C
BellSouth Comm	182	5,056,109	2,025,607	40%	B
Southern Co. Serv	513	25,402,145	23,029,098	91%	B
Railroads:					
CSX Railroad	196	7,076,634	4,005,570	57%	B
Norfolk Southern	302	11,317,136	9,541,231	84%	B
Banks:					
AmSouth	2416	82,666,028	82,666,028	100%	
First Alabama	1474	22,112,586	22,112,586	100%	

Employer	Number of Employees	Gross Wages	Wages Subject to Occupatoinal Tax	Percentage of Wages Subject to Occupational Tax	Code
SouthTrust	1900	35,936,765	35,936,765	100%	
Compass	2068	47,547,306	47,547,306	100%	
Synovus Mtge Corp	14	273,636	273,636	100%	
Nat'l Bank of Com	569	6,126,220	6,126,220	100%	
Colonial	287	6,021,484	6,021,484	100%	
Insurance Companies:					
Blue Cross	2020	61,263,846	55,736,229	91%	A
Liberty National	936	17,500,580	15,622,782	89%	A
Protective Life	850	20,664,678	19,042,111	92%	A
State Farm Mutual	791	25,077,876	24,416,714	97%	B
Abstract Companies:					
Alabama Title	42	677,373	677,373	100%	
Lawyers Title	21	531,653	357,690	67%	F
Doctors Offices:					
UAB Health Found. & Kirklin Clinic	2708	82,421,543	28,606,920	35%	F
Norwood Clinic	626	35,802,699	9,272,532	26%	F

Employer	Number of Employees	Gross Wages	Wages Subject to Occupatoinal Tax	Percentage of Wages Subject to Occupational Tax	Code
Accounting Firms:					
Arthur Anderson	52	1,491,390	221,635	15%	F
Ernst & Young	159	4,878,589	687,516	14%	F
Ice Cream Manufact:					
Barber's Dairy	558	11,329,290	10,608,761	94%	B
Baker & Sons	135	3,611,930	2,719,066	75%	B
Trailers, Road Mach:					
Thompson Tractor	430	16,900,119	15,978,064	95%	B
Embalmers:					
Johns-Ridout	36	505,479	505,479	100%	
Engineering Firms:					
BE&K Engineers	223	11,404,579	9,123,131	80%	A
Engineer Service	53	1,733,104	1,200,130	69%	F
Architectural Firms:					
Harold L. Foshee	2	116,278	10,968	9%	F

Employer	Number of Employees	Gross Wages	Wages Subject to Occupatoinal Tax	Percentage of Wages Subject to Occupational Tax	Code
David L. Preacher	5	110,252	55,252	50%	F
Surroundings, Inc.	5	87,280		0%	F
Giattina Fisher	44	1,333,331	444,713	33%	A
Law Firms:					
Bradley, Arant	225	7,379,503	4,219,401	57%	F
Haskell Slaughter	87	5,423,228	812,170	15%	A
Sirote Permut	279	12,236,248	5,280,977	43%	F
Baxley Dillard	12	125,162	125,162	100%	E
Auto Repair Shops:					
Auto & Truck Rpr	9	183,807	183,807	100%	
Bates Western Aut	20	205,374	205,374	100%	
Doss Auto Rpr	12	194,734	194,374	100%	
Bowling Alleys:					
Pine Bowl	6	40,870	40,870	100%	
Vestavia Bowl	77	230,648	230,648	100%	

Employer	Number of Employees	Gross Wages	Wages Subject to Occupatoinal Tax	Percentage of Wages Subject to Occupational Tax	Code
Delicatessens:					
Sophia's Deli	6	44,011	44,011	100%	
Dixie's Deli	32	104,920	104,920	100%	
Golf Courses:					
Old Overton Club	29	73,216	73,216	100%	
Quail Ridge	35	179,794	179,794	100%	
Glass Salesmen:					
Martin Glass Co.	13	56,487	31,308	55%	B
Cassady & Self	25	830,277	830,277	100%	
Innkeepers:					
Americas Best Inn	66	210,470	210,470	100%	
Holiday Inn Airpt	100	1,171,124	1,171,124	100%	
Laundries & Dry Cl:					
University Coin L	21	42,365	42,365	100%	
Flamingo Dry Cln	83	396,232	392,232	100%	

Employer	Number of Employees	Gross Wages	Wages Subject to Occupatoinal Tax	Percentage of Wages Subject to Occupational Tax	Code
Plumbers/Steamfitt:					
Acton Plmbg & Htg	21	312,150	312,150	100%	
Baker Plumbing	7	41,622	41,622	100%	
Peddlers/Itin Vndr:					
Global Coffee Ser	8	240,877	240,877	100%	
Larry's Rag Co	33	209,153	209,153	100%	

CODES EXPLAINING REASONS WHY WAGES ARE NOT SUBJECT TO OCCUPATIONAL TAX:

A — Professional licenses & out-of-county work
B — Out-of-county work
C— Out-of-county work & pension distributions
D — Attorneys on a separate payroll
E — Attorneys not reported to county
F — Professional licenses
G — Business located in another county

A History of

EDUCATIONAL FINANCE in ALABAMA

1819-1986

Ira W. Harvey

CHAPTER IV.

THE ALABAMA SPECIAL EDUCATIONAL TRUST FUND (1927 -1987)

THE 1927 QUADRENNIUM

Financial Conditions of Public Education, 1927.

Despite provisions of the Constitution of 1901 to provide educational financing through the Public School Fund to meet the constitutional mandate to "establish, organize and maintain a liberal system of public schools throughout the State for the benefit of all children thereof between the ages of seven and twenty-one years," it was obvious that the Public School Fund was inadequate (Constitution of 1901, Section, 256). The following revenues accrued to the Public School Fund:

1. The annual interest at six per cent on all sums of money which have heretofore been or which may hereafter be received by the State, or to the several townships thereof, valueless sixteenth section fund, and school indemnity fund for school purposes.

2. The annual interest at four per cent on that part of the surplus revenue of the United States deposited with the State under the act of Congress approved June 23, 1836.

3. All annual rents, incomes, and profits or interest arising from the proceeds of sales of such lands as may hereafter be given by the United States, or by this State, or by individuals, for the support of the public schools of the State.

4. All such sums as may accrue to the State as escheats the same to be applied to the support of the public schools during the scholastic year next ensuing the receipt in the State treasury.

5. The net amount of poll tax that may be collected in the State; poll tax collected in every county to be retained therein for the support of the public schools thereof and distributed and disbursed as provided in this chapter.

6. Licenses which are by law required to be paid into the school fund of any county to be promptly paid by the Judge of Probate or other person collecting the same to the custodian of public school funds of the county or district, to be expended for the benefit of the public schools of each county.

7. A special annual tax of thirty (3) cents on each one hundred dollars worth of taxable property in this State.

8. A further sum or sums to be appropriated by the Legislature for each scholastic year (School Code of 1927, Section 9).

Of the revenue sources of the Public School Fund, the interest in items (1) and (2), as well as the special appropriations of item (8), was paid from the General Fund. The net amount from use of lands, item (3), from escheats, item (4), and from poll tax, item (5), was small.

Therefore, only the statewide 3.0 mill property tax actually provided significant revenue to the Public School Fund.

At the local level, constitutional taxes consisted of the 1.0 mill and 3.0 mill taxes to be levied at the county level. However, these were not mandatory unless approved by the local taxpayers. A district property tax of 3.0 mills could also be levied with the consent of the voters and only if the 3.0 mill county tax was levied first. Therefore, the only significant funding at the local level was also based on the property tax.

Many different funds had been established since 1901, with the majority of these receiving revenues through the General Fund. And the major source of revenue for the General Fund was again the property tax. Such heavy reliance upon the property tax, coupled with the state's efforts to create a statewide system of elementary and secondary schools with a minimum seven-month term, placed undue stress on the property tax. While the growth in property tax was certain, it was slow and did not have the growth potential to meet all needs of education. Therefore, the 1927 legislature was forced to look elsewhere to meet rising needs of both elementary-secondary education and higher education.

The Seven-Month School Term, 1927

A major campaign issue in the gubernatorial election of 1927 had been the problem of providing a uniform seven-month school term for all children in Alabama. There had appeared no argument against the seven-month school term, only disagreement regarding the means of financing it. This problem was fully documented in the preceding chapter and will not be discussed here. In order to accomplish the seven-month school term, two factors had to be addressed: one was the inadequate revenue available to education; the second

was the problem of how to provide funds for the poorer counties so as to make the money available to schools more nearly equal throughout the state. Previously (1919), the Revolving Fund of $100,000 annually had been made available to promote equalization; this amount was grossly inadequate:

> The Joint Committee on Education of the Legislature of 1923 unanimously recommended increasing this fund to a million dollars. More recent studies show that in order to carry out an equalization program an even larger sum would be necessary. It would require not less than one and one-half or two million dollars. This amount would scarcely give a term of seven months; and to do this, even on the present low salary schedule, it would be necessary for all fees now collected, amounting in the aggregate to a million or more dollars annually, to be continued as a part of the school fund. If this private source of income is to be eliminated, it will be necessary to provide an amount totaling two and one-half to three million dollars in order to enable the schools in every county to remain in session for a period of one hundred and forty days on the present cost basis, which is far below the national average (*Annual Report*, 1926, pp. 14-15).

The effort to provide the seven-month school term would involve equalizing financial opportunity for 219 public school units in the state, 67 county systems, 63 county high schools, 11 state secondary agricultural schools, 50 city systems, and 28 town systems (*Annual Report*, 1926, p. 80). As the state began its efforts in 1927 to promote equalization, and in effect, a minimum foundation program, the problem of inadequate financial support for this measure was evident. This problem would recur later in 1935 with the Minimum Program Act.

In order to understand the conditions which contributed to shaping the financial situation of Alabama's schools in 1927, it is advisable to look back a few years. As Alabama was the only state in the union in which the legislature met in regular session only once in four years, the history of state support of public education in Alabama naturally divides itself into four-year periods.

Before 1927, the state did not attempt to equalize educational opportunity on a comprehensive basis. The first public school law, enacted in 1854, recognized the then existing inequalities of opportunity and endeavored to overcome them by providing that townships receiving income from sixteenth section lands granted by the federal government should not share in the legislative appropriations for education until townships receiving no such income were brought up to parity with those enjoying income from public land.

By provisions of the Constitution of 1901, the only substantial state support provided the public schools through the preceding quadrennia to 1927 was the Public School Fund, which was apportioned on a school census basis. The Public School Fund, comprised of the three-mill constitutional tax for schools, interest on sixteenth section funds, certain other minor sources of revenue, and an appropriation of $500,000 from the state General Fund, amounted to only about $3,515,000 annually during the 1923 quadrennium. Certain other special appropriations amounting to approximately $1,017,000 annually were made for county high schools, state secondary agricultural schools, etc., but these funds were not available for general distribution. During the quadrennium ending in 1927, five-month elementary terms and six-month high school terms were common in the white schools of about seventeen counties of the state (*Annual Report*, 1935-37, Part 1, p. 14). The issue was clear that the school term must be in-

creased and that new sources of revenue would have to be found.

The Alabama Special Educational Trust Fund Enacted, 1927

In the message of newly elected Governor Graves to the legislature on June 7, 1927, he defined the main business before the body as that of finding the revenue required for the needs of the schools. He said that "Alabama can afford all the millions of dollars that her necessities demand, but she cannot afford one penny that is not necessary" (Graves, June 7, 1927, p. LXXXVI, Regular Session).

In searching for additional revenue sources, the Recess Committee on Ways and Means recognized that school revenue came from only two sources: taxes on ad valorem property and legislative appropriations. Under the provisions of the constitution, the statewide 3.0 mill tax, the 1.0 mill county ad valorem tax, and the 3.0 mill county and 3.0 mill district ad valorem tax approved by constitutional amendment in 1916 represented the mills of taxation already being collected on ad valorem property for school purposes. In addition, the constitutional poll tax collected and kept in the counties for school purposes did not yield much revenue. Thus, in 1927 property owners were bearing the heaviest taxation in support of the state's school system. The legislature, recognizing this, concluded that new sources other than ad valorem property taxes must be tapped (Cain, pp. 72-74).

The Recess Committee on Ways and Means, having studied various methods of obtaining new revenue, reported a tax measure known as the Tunstall Revenue Bill to the House of Representatives. This bill proposed several kinds of luxury and nuisance taxes, especially increased levies on tobacco products. With Governor

Graves' endorsement it passed the House on June 17, 1927, by an overwhelming vote.

The Tunstall Revenue Bill, however, did not place any additional taxation on railroads, iron and coal interests, and other large corporations. Therefore, it was very unpopular in many quarters, and some 50 prominent businessmen appeared in Montgomery to voice their disapproval. The *Mobile Register* assailed the House of Representatives as a lobbyist interest for the railroads, the power companies, and the mining companies (The *Mobile Register,* June 18, 1927).

The Graves strategy, unknown at this time, was to wait for a more favorable opportunity to kill the measure rather than attacking it in the House. The Senate Committee on Finance and Taxation held public hearings on the Tunstall Bill, and on July 13, 1927, the measure was defeated by the Graves interests in the Senate. A modified measure was enacted placing taxes on coal, iron ore, minerals, railroads, telephone, telegraph and express companies, hydroelectric power, and numerous other commodities. With the bill virtually rewritten and passed by a vote of 21 to four in the Senate, the House had little choice but to accept the Senate's new version (Gilbert, p. 32).

Act No. 163 (H. 359—Tunstall) entitled "An Act In Reference to and to Further Provide for the General Revenue of the State of Alabama" was approved by Governor Graves on July 22, 1927. Section 2 of the Act specified new revenue sources to be levied for educational purposes:

2-A. A tax of 2 ½ per cent on gross receipts of intrastate business of railroads.

2-B. A tax of 2 ½ per cent on gross receipts of telegraph companies.

2-C. A tax of 2 ½ per cent on gross receipts above $50,000 of telephone companies.

2-D. A tax of 2 ½ per cent on gross receipts of express companies.

2-E. A tax of 2/5 of a mill on each kilowatt hour on hydroelectric companies.

2-F. A tonnage tax of 2 ½ cents per ton on the mining of coal.

2-G. A tonnage tax of 4 ½ cents per ton on the mining of iron ore.

2-H. A severance tax on sand, gravel, slag and other mineral products other than coal and iron of 3 per cent on net value at mine after deducting cost of mining and quarrying.

2-I. A tax of $20,000 per year on sleeping car companies.

2-J. A tax of 15 per cent on the wholesale price of cigars, cigarettes, and cheroots.

Section 2-K specified the purpose of these revenues.

2-K. All revenue collected under provisions of Section Two (2), 2-A, 2-B, 2-C, 2-D, 2-E, 2-F, 2-G, 2-H, 2-I, and 2-J of this Act shall be paid to the State Tax Commission of the State of Alabama by check or draft made payable to the State Treasurer and shall be set apart as a Trust Fund for Educational purposes only, to be designated as the Alabama Special Educational Trust Fund, and shall be kept separate and apart from all other funds in the State Treasury, and shall be paid out by the Treasurer on lawful appropriations, hereafter made specially from such funds by the Legislature of Alabama for educational purposes. The provisions of this section shall go into effect on October 1, 1927. (Acts of Alabama, 1927, No. 163, pp. 139-148).

The earmarking of these revenues to the credit of the Alabama Special Educational Trust Fund (ASETF), after deduction of the cost of collection, has been carried forward in the present code (Code of Alabama 1975, Section 40-1-31). Other taxes earmarked in the future to the credit of the ASETF carry other code citations. These will be discussed fully in Chapter VI.

In addition, this Act placed privilege and license taxes upon insurance companies, accountants, insurance adjusters, architects, attorneys, retail sales from railway cars, dentists, doctors, engineers, motor trucks, auto dealers, and assorted other professional and business pursuits, including a tax of two cents per gallon on lubricating oil. The total revenue from this bill was estimated to yield about $4 million in its first year. Practically all of this revenue would be generated from those taxes earmarked to the Alabama Special Educational Trust Fund (Acts of Alabama, 1927, No. 163, pp. 139-187).

With the passage of this revenue bill, Governor Graves commented:

> This is Alabama's great day, her independence day. Today she is free and I thank God for this legislature that has done more for the rehabilitation of the state than any other in her history. (*Montgomery Advertiser,* July 15, 1927.)

Unified Educational Program, 1927

The legislative session of 1927 witnessed a well-intentioned endeavor to promote by generous appropriations the development of education in Alabama through Act 163, and through the Unified Educational Program Act, No. 382. The legislation of that year (embodied for the most part in the act of August 25, 1927, No. 382), in spite of its failure to provide adequate revenue to meet the additional expenditures authorized in the law, must be viewed as a significant forward step in the educational

history of the state. While financially incomplete or premature, its purposes and provisions, considered from the standpoint of educational need, were basically sound. It is doubtful, however, whether it can be rightly termed a "Unified Educational Program" because it was accompanied by none of the changes in organization and it embodied none of the budgetary principles which were essential to the establishment and execution of such a program. The act contained the following appropriations:

1. $900,000 to the Equalization Fund
2. $850,000 to the Attendance Fund
3. $18,300 to the Library Fund
4. $128,500 to the Rural Schoolhouse Building Fund
5. $37,500 to the Illiteracy Fund
6. $200,706 for the Vocational Education Fund
7. $411,000 to the County High School Fund
8. $32,000 to the State Department of Education

The concluding section of the law provided that these appropriations should be payable out of the special trust fund created and set apart by Section 2 of the General Revenue Bill of 1927: "and in the event such trust fund is insufficient to cover said appropriations, then the balance of the same shall be payable out of any funds in the treasury not otherwise appropriated." This provision and its bearing on the general financial situation were significant in years to come (Brookings, 1932, pp. 282-283).

Results of the Seven-Month School Term, 1927

The legislature of 1927 not only provided additional funds for the support of public education, but set up the specific provisions for financing a program of education of not less than seven months. Definite objectives were sought in the expenditure of new funds, but the general dominating purpose was to provide an equal educational opportunity for all the children of the state.

Studies conducted in 1925 and 1926 led to the selection of a $750 teacher unit for elementary grades and a $1,400 teacher unit for high schools. A teacher unit, as set out in the law, represented the total cost of education of thirty pupils in average daily attendance during any given school year of not less than seven months. Reduced to the lowest denomination, this meant $25.00 for the education of each elementary pupil and $46.66 for the education of each high school pupil. These figures were arrived at by finding the average cost per teacher or pupil unit in the state. The figures given above approximate what was found to be the average cost of education. The total of the new appropriations, it was thought, would provide sufficient funds to hold to these teacher unit values during the quadrennium. As a matter of fact, during the 1927-28 school year, not only was the amount available sufficient to do this, but an additional allowance of 3.5 percent of the total cost of the program was allocated to the counties eligible to share in the apportionment of the equalization fund.

However, the increase in attendance was unprecedented during 1927-28 and 1928-29 and went far beyond the estimates on the basis of which the appropriations were made. There was an increase in aggregate attendance of more than 11 million school days over the two-year period. This naturally involved an increase in the number of teacher or pupil units. The distribution of the Equalization Fund to the counties had to be made on the basis of this increased attendance. Unfortunately, there was exactly the same amount of money available for distribution the following year, but the larger number of teacher units made the amount for each unit a little less. As a consequence, instead of having a surplus to distribute as had been the case in the previous year, it became necessary to reduce the value of the teacher or pupil unit by 5.5 percent. This reduction made it necessary to lower

the cost of the equalization program from the teacher unit cost for the previous years ($750 and $1,400 teacher unit values) by about $350,000, which, in reality, was the amount by which the Equalization Fund should have been increased (Annual Report, 1929, pp. 21-22).

The Great Depression, 1929

Soon after the Unified Education Program enacted by the 1927 legislature and funded through the ASETF went into effect, reductions in school revenue rather than increases were the order of the day. School revenue reached its highest point during the 1928-29 school year. The decrease in revenue felt for the first time since the Constitution of 1901 was adopted came in the 1929-30 school year. While the decrease was not serious, it heralded the impending disaster of the 1931 quadrennium.

Public expenditures for all educational purposes did not peak until 1929, while the percentage expenditure of educational funds for elementary and high schools decreased steadily during the quadrennium (Brookings, p. 262). As the economic situation grew worse, the problem of over-reliance on the property tax for both state and local education funding grew more acute. Whereas in 1910 the state could collect 55.6 per cent of its total revenue from the property tax, by 1930 it could collect only 26.6 per cent from this source.

By 1930 the financial conditions of both the state and public education were becoming alarming. State Superintendent A.F. Harmon summed up his fears for education's future:

> That sacrifices and adjustments of one kind or another may have to be made seems inevitable. But the distress of the State in years to come will be infinitely more pressing and the shame will be ours if we balance the budget with the ignorance of our children (*Annual Report,* 1931, p. 43).

Public education had advanced greatly in Alabama during the 1927-31 quadrennium largely as the result of increased state support. White rural elementary schools generally operated a minimum term of seven months, white rural high schools operated nine months, and in the cities both elementary and high schools for whites generally operated for nine-month terms. The appearance was that educational conditions should continue to improve.

> But sad days were rapidly approaching for the public schools of Alabama. The effects of the depression were becoming apparent on every hand. The assessed valuation of property was being rapidly lowered and state revenues were tobogganing downward (*Annual Report*, 1935-37, p. 15).

By 1929, educational expenditures had peaked on the basis of the educational program financed in the 1927 quadrennium. During this period, the percentage of state funding for public education increased dramatically as an expanded school term and equalization were sought. This is shown in Table 4-1.

Table 4-1

State Funds as a Percent or Total Education Fund, FY 1927 to FY 1931

Year	Total State and Local Funds	Total State Funds	Percentage State Funds
1927	$19,123,654.19	$5,491,069.18	28.7
1928	21,838,923.94	7,557,694.94	34.6
1929	22,827,472.85	7,767,479.85	34.0
1930	21:344,928.37	7,887,789.37	37.0
1931	20,373,922.45	8,019,010.45	39.4

Source: *Annual Reports*, 1927 to 1931

Whereas in 1927 the state had contributed less than one third of all funds derived from state and local revenues raised for public school purposes, by 1928 and 1929 it contributed a little more than one third, and by 1930 and 1931 nearly reached two fifths.

This increasing percentage of state support for education would become a major problem in the next quadrennium. With state revenues being hardest hit by the depression, the proportionate shortfall that education could expect would be dramatically heightened as education became a "nonessential" function of state government. However, this future was unforeseen as well as the devastating effects of the depression:

> When money is lacking for the retirement of debts contracted in good faith for educational purposes; when those who earn their living by furnishing the educational service demanded by the State must go unpaid, when the State, on account of lack of funds, must waive even temporarily efforts to provide instruction in amount and kind adequate to the needs of its young, there may not be occasion for alarm but there is need for the noblest kind of thinking on the part of all who are in any way concerned with education or are in any measure responsible for its effective functioning. These conditions are outcomes of economic depression (*Annual Report*, 1931, p. 28).

In an argument of contemporary interest, a plea was made for not reducing any state funding for public education: Admitting as we do the financial embarrassment of the State, it would be a tragic error to force the support of the public school system back upon the local units. Even in times of economic depression, such as we now suffer, it would be a cruel wrong to pay our public debt with money which should provide the children of this generation with

> education that will enable them better to meet the obligations that fall due in the years to come. It is unthinkable that Alabama as a State will ever balance its budget at the expense of the cost of the public school system (*Annual Report*, 1931, pp. 30-31).

This assumption was short-lived in the face of the rapidly changing financial conditions of the state. Alabama did balance its budget at the expense of its children in the public schools.

The 1931 Quadrennium

Financial Condition of Public Education, 1931

As Governor Bibb Graves left office on January 13, 1931, he was proud of his administration's accomplishments. Comparing the total education appropriations of Graves' administration to that of the two previous administrations reveals great progress. The length of the school term increased during Graves' administration, as is seen in Table 4-2.

TABLE 4-2

LENGTH OF PUBLIC SCHOOL TERMS IN DAYS PER YER FROM FY 1926 TO FY 1930

	White	Black	Total
1925-26			
Elementary School	140	114	131
High School	163	164	163
Elementary and High School	146	117	137
1926-27			
Elementary School	155	116	141
High School	168	164	167
Elementary and High School	158	129	147

1927-28			
Elementary School	154	123	143
High School	167	165	167
Elementary and High School	158	127	148
1928-29			
Elementary School	155	125	144
High School	169	165	169
Elementary and High School	159	129	149
1929-30			
Elementary School	155	126	145
High School	170	166	170
Elementary and High School	159	130	150

Source: *Annual Reports*, 1926, 1927, 1929, and 1931.

But by 1930 the effects of the depression were influencing the appropriations promised education some four years earlier, and the school program suffered. Revenues were insufficient to meet school appropriations in 1930, and as a result warrants were used to pay teachers salaries. The hardships that were to befall Alabama were in many ways similar to those of the Reconstruction Era (Cain, pp. 206-207).

The governorship was assumed by B. M. Miller in 1931. Miller spoke optimistically of the state of education in his address to the legislature, January 13, 1931:

> In education we have progressed all along the line. At the beginning of the last Session a $600,000 appropriation was made to bring the terms of rural schools up to a minimum of seven months and since that time, as a rule, this minimum has been maintained.
>
> During the six years from 1924 to 1930, the average school term for all children in the public schools of Alabama increased 17 days, from 133 days to 150 days. The term for elementary grades increased from 130 days to 145 days, or

15 days during this period, while the high school increased 5 days, from 165 to 170.

The natural growth in the number, the extension of terms, the greater attendance, and the expenses of consolidation have all increased to the point where our present appropriations are far short of our necessities. Alabama will not be true to herself and her own if she does not meet these needs and maintain this progress (Miller, Jan. 13, 193 1, p. VI-VII).

However, Governor Miller's administration seemed unable to cope with the growing crisis precipitated by the Great Depression of 1929, and, by the 1932-33 school year, the picture had darkened considerably:

> The impending disaster broke in full force in the 1931-35 quadrennium. The people of the State were panic stricken. Educational appropriations could not be paid due to a deficit in the State Treasury. Local school boards cut teachers' salaries and instituted every possible economy but such measures could not possibly meet the deficit in school funds. Efforts were made to increase state revenues in order that education appropriations might be paid but those efforts failed. (*Annual Report*, 1935-37, p. 15)

This disaster was fully reflected in the educational conditions under which the school year 1932-33 operated.

> (a) over 50,000 white children or approximately 21 percent of the children in the white rural schools of Alabama had school terms of three months and less.
>
> (b) over 129,000 white children or approximately 55 percent of the children in the white rural schools had school terms of five and one-half months and less.

> (c) over 48,000 regular students did not even enroll in school, either due to short terms or no available school opening (*Annual Report*, 1935-37, p. 16).

Store License Tax, 1931

The only additional tax passed for education during this period was the store license tax, approved in 1931, but it provided too little. The disaster would have to unfold completely before major new revenues would be found for education.

The store license tax, known as a "chain store tax" was passed by the legislature on July 7, 1931, to go into effect on October 1, 1931. The Act required a license to operate an "establishment of stores" in this state. For one store license it imposed a $1 fee; for the next four stores the fee was $10 each; for the next five stores it was $15 each; for the next ten stores it was $25 each; and for additional stores over twenty it was $75 each. In addition to the tax imposed, an application fee of 50 cents was required for each store. This tax ran with the calendar year, with half-year tax due after July 1 (Acts of Alabama, 1931, No. 369, p. 431).

The store license tax brought about considerable litigation. Although its constitutionality was attacked by the large chain store owners, the law did become operative October 1, 1931, and was upheld in court in the fall of 1931.

This tax was earmarked by Section 10.

> All money collected under the provisions of this Act, less the expenses incurred in the administration of this Act, shall be paid into the State Treasury, monthly, by the State Tax Commission, and shall be added to and shall constitute a part of the Education Trust Fund (Acts of Alabama, 1931, No. 369, p. 431).

The Brookings Institute Report, 1932

With bankruptcy facing the state, the legislature passed an act on January 30, 1931, requesting the services of the Institute for Government Research of the Brookings Institute of Washington, D.C., to survey the state government. The areas studied would be the administrative structure of the state government, the state's existing financial condition including a review of financial operations during recent years, and a review of the financial administration of the state and its political subdivisions, the taxation system of the state and the counties, and county government. The report was submitted to Governor Miller on June 11, 1932 (Brookings Institute, p. 3).

Financial Condition of the State, 1931. The report showed the state to be running a consolidated current deficit of $18,206,258.17 as of September 30, 1931. For the five-year period from 1927 to 1931 inclusive, the General Fund receipts exceeded ordinary expenditures by $2,921,872.82. Mandatory transfers from the General Fund to cover other appropriated expenses, however, totalled $15,713,526.75, leaving a deficit of $12,791,653.93. For 1931, the following transfers from the General Fund were for education:

1. Public School Fund:
   a. Constitutional $189,583.12
   b. Statutory law $500,000.00
2. Alabama Special Educational Trust Fund $1,916,562.67

These transfers were a part of the state funding crisis:

> This. . . .illustrates clearly why the General Fund has been accumulating an increasing deficit each year since October 1, 1927, particularly since the enactment of Act 382 (Unified Educational Program Act) of 1927, permanently appropriating additional funds for educational purposes. That the 1927 Legislature had some doubt that the new taxes authorized in Sections 2, 2A, 2B, 2C, 2D, 2E, 2F, 2G, 2H, 2I, and 2J of the general Revenue Bill of 1927 (Act 163, 1927) would be sufficient fully to finance the supplemental educational expenditures authorized in Act 382, there can be little question. If it had intended fully to finance these additional appropriations from the new taxes levied in the above sections of the general Revenue Bill, which directs that all taxes collected shall be credited to the "Alabama Special Educational Trust Fund," Section 31 of Act 382 of 1927 would have been superfluous.
>
> This section, which provides that "in the event such trust fund is insufficient to cover said appropriations, then the balance of the same shall be payable out of any other funds in the treasury not otherwise appropriated," (General Fund) should be repealed, and the sums now permanently appropriated should be reconsidered by each succeeding legislature, with a view either to reducing the appropriation grants to come within the estimated revenue to be received each fiscal year, or to levy additional taxes to finance the expenditures. Toward the total General Fund deficit of $12,792,000.00 accumulated in the past five years, these supplemental educational expenditures have contributed $7,278,157.27 and pensions $3,194,539.79, or a total of $10,472,698.06 (Brookings Institute, Vol. 3, p. 40).

Cause of the State's Financial Difficulty, 1901 to 1931. What resulted from the failure of previous legislatures to enact an effective budget law, to require a proper accounting system to control financial transactions, to pro-

duce current financial data needed by both the chief executive and the legislature, and to adopt an adequate appropriation system? These questions were answered in the Brookings report:

> (1) The state government has not balanced its budget since the close of the fiscal year 1907, when it had a surplus of $187,499.08.
>
> (2) It has expended more money each fiscal year of the last decade than it has received within a fiscal year from all sources other than borrowings.
>
> (3) It has not had sufficient cash on hand at the close of any given fiscal year during the past two decades to liquidate its immediate demands against cash, even after levying new taxes in 1919 and 1927, and applying highway revenues and proceeds of bond sales, except at the end of the fiscal years 1921, 1922, 1925, 1926, and 1927 (Brookings Institute, Vol. 3, p. 16).

The Condition of Educational Finance, 1931. The financial system for supporting education that had evolved was very cumbersome, with many different funds for different purposes. Monies for public education were appropriated through the Public School Fund, the General Fund, and the Alabama Special Educational Trust Fund (ASETF).

In 1931 the Public School Fund consisted of the following sources:

1. Sixteenth section lands
2. Valueless sixteenth section lands
3. Surplus revenue
4. School indemnity lands
5. James Wallace Fund
6. Escheats

7. The statewide 3.0 mill tax

Appropriations from the General Fund in 1931 were for the following purposes:

1. $17,500 to the State Board of Education for the State Department of Education (School Code, 1927, Sec. 62).
2. $5,000 annual contingency fund to the State Department of Education (School Code, 1927, Sec. 25).
3. $15,000 for certification and placement of teachers and $15,000 for the training of teachers (School Code, 1927, Sec. 369).
4. $500,000 continuing annual appropriation to the Public School Fund (School Code, 1927, Sec. II).
5. $257,000 for the Local Tax Bonus Fund (School Code, 1927, Sec. 320).
6. $135,000 for the county high school fund (School Code, 1927, Sec. 468).
7. $12,500 for the removal of illiteracy (School Code, 1927, Sec. 425).
8. $100,000 for a revolving fund (School Code, 1927, Sec. 64).
9. $221,500 for the Rural School House Fund (School Code, 1927, Sec. 370-1).
10. $6,700 for a bureau of information and industrial aid for the blind (Act of September 6, 1927).
11. $82,500 for State Secondary Agricultural Schools (School Code, 1927, Section 470).
12. $181,000 for vocational training and civilian rehabilitation (School Code, 1927, Section 420).
13. $150,000 for securing and distributing textbooks (School Code, 1927, Sec. 447).
14. $150,000 for assisting counties and cities in purchasing textbooks (School Code, 1927, Sec. 451).

Appropriations from the Alabama Special Educational Trust Fund in 1931 were for the following purposes:

1. $900,000 to the Equalization Fund
2. $850,000 to the Attendance Fund
3. $18,300 to Rural School Libraries
4. $128,500 for the Rural Schoolhouse Fund
5. $37,500 for the Illiteracy Fund
6. $200,706 for Vocational Education
7. $411,000 for high schools
8. $32,500 for the State Department of Education

At this same time, the following local taxes were being used to support public education in addition to state revenues:

1. The net amount of poll tax collected in the county (Constitution of 1901, Section 259).
2. One-mill and three-mill county taxes, (Constitution of 1901, Section 269 and Amendment III, Article XIX, Section 1) neither of which is made mandatory by the constitution.
3. Three-mill district tax allowable only if the county is levying not less than a 3.0 mill special county school tax (Constitution of 1901, Amendment III).

It should be particularly noted that neither the 1.0 mill tax nor the 3.0 mill tax was made mandatory by the constitution on any county; no tax up to 4.0 mills could be levied by a county unless "the rate of such tax, the time it is to continue, and the purpose thereof, shall have been first submitted to a vote of the qualified electors of the county," and voted for, in the case of the three-mill tax, by a majority of those voting. A further constitutional limitation on county school taxation provided that the total rate of taxation in any county for state and county combined should not exceed $1.25 on each $100 of taxable property, which left only five mills to the county unearmarked (As a result of Amendment 3 the real cap was $1.85.).

Actual Levy of County Taxes, 1931. It appears that in 1931 at least 56 counties were levying the 1.0 mill tax and all of the counties were levying the 3.0 mill tax. In addition, four counties were levying additional countywide taxes for school purposes, with the result that in Baldwin, Mobile, and Montgomery Counties, the total for school purposes amounted to 6.0 mills. Jefferson County was levying 4.5 mills.

In 1931, there were 1,23 8 special school taxing districts in the state, exclusive of the municipalities, ranging from one in Lowndes County to 64 in Marshall and in Morgan Counties. The average number of special school taxing districts in each county was 18.4. Nearly all of these districts were levying the 3.0 mill tax, thus raising the total school tax rate to 7.0 mills. In only 13 districts was the tax rate 2.0 mills. About 30 counties were entirely covered by special school taxing districts. As the usual county-wide tax levy was 11.5 mills, which would be increased in practically all special school districts to 14.5, it will be seen that in the greater part of the state, education was absorbing almost half its revenue from ad valorem taxation. Thus, the problem of financing the schools was closely related to the problem of property taxation (Brookings, 1932, pp. 266-269).

The problems of property taxation in 1931 are much the same as today. Issues such as fair appraisals, equal application of the appraisal process and restrictions on the number of mills that could be levied are current today. Even federal court intervention has failed to quiet criticisms made about the application of the property tax in Alabama.

Shortcomings in Educational Finance, 1932. In its review of Alabama's financial situation, the Brookings Report of 1932 defined the shortcomings of Alabama's system for the support of public schools:

The reliance that is placed in Alabama on ad valorem taxation for the financing of the public schools places a disproportionate share of the burden of educational support on the owners of property. The entire system, including the method by which the taxes are levied, has other conspicuous shortcomings.

Embodied in the Constitution, it lacks the flexibility necessary for adjustments to conditions, which change from year to year and vary from county to county and from district to district. Since local taxes are subject to popular approval, it endows the electorate with a budgetary and appropriation function with respect to a single field of administration. Voters can hardly be expected to judge intelligently the educational needs of an entire county. The matter is entirely too complicated, particularly where a majority of voters are non-taxpayers and for that reason are likely to feel little responsibility for the taxes that they vote. But, at the best, no intelligent action is possible with respect to one field of administration unless the needs of all other fields are at the same time taken into account. The present system permits, in general, no comparison between the needs of education and the needs of other functions, such as law enforcement, health, welfare, and highways.

Moreover, an indispensable feature of a proper appropriating system, is that appropriations should be subjected to periodical review. If the electorate is competent to vote on appropriations, it should do so oftener than once every ten, twenty, or forty years. Yet, no one would seriously propose the submission of school tax levies annual or biennially to the county or district electorate.

> By earmarking taxes for specific purposes, the plan now prescribed by the Constitution makes necessary an excessive number of special funds, complicates and confuses accounting, and renders impossible any clear understanding of the cost and needs of schools.
>
> It is fully realized that the present system has not been without its advantages in the educational development of Alabama. It is believed, however, that the time has come for a more flexible system in financing the public schools and one more in conformity with modem practice in budgeting and financial control (Brookings Institute, pp. 276-277).

The theory of state-aid funds at this time appears to have been based on three precepts:

1. that the public schools could not or should not be maintained entirely by local taxation;
2. that counties should be encouraged to levy the maximum constitutional tax rates for school purposes; and
3. that substantial equality of educational opportunity should be provided for all the children of the state, whether resident in the wealthier or in the poorer counties.

The effects of the Depression of 1929 would destroy equalization and force nearly total support for the schools back on the local communities. Nothing could obscure the obvious fact that the state was in deep financial trouble and could not afford to support public education.

The Budget and Financial Control Act of 1932

On August 16, 1932, the legislature met in extraordinary session to deal with the problems. Governor Miller proposed a program for meeting the deficit and correct-

ing the underlying causes of the continuing deficits. In brief, that program embraced the following: (1) the funding of the warrants and accounts payable; (2) the levying of an income tax; (3) the reduction of appropriations based upon consolidation of offices and functions and upon salary cuts; and (4) improvements in accounting and budgeting, with considerable stress placed on a provision to make no appropriation payable in full unless there were sufficient funds to meet it (Alyea, p. 16). The Budget and Financial Control Act known popularly as the "Fletcher Act," was passed on September 27, 1932. It was an ambitious piece of legislation designed to correct administrative and legislative inadequacies of long duration. Three areas were addressed: (I partial administrative reorganization, (2) reform of legislative appropriation practices, and (3) budgetary reform. (Alyea, p. 16).

The section of this Act which would become a center of controversy an disappointment to public education deals with appropriations:

> Section 19.—APPROPRIATIONS: The appropriations made shall not be available for expenditure until allotted as provided for in Section 20, except as may be otherwise provided in this Act. All appropriations now or hereafter made except per-capita appropriations now in force or hereafter made to eleemosynary and correctional institutions and the Alabama School for Deaf and Blind at Talladega, Alabama, which appropriations shall remain in full force and effect and payable and disbursed as now provided by law are hereby declared to be maximum, conditional and proportionate appropriations, the purpose being to make the appropriations payable in full in the amounts named only in the event that the estimated budget resources during each fiscal year of the quadrennium for which such appropriations are made, are sufficient to pay all of the appropriations in full; the Governor shall restrict allotments to prevent an overdraft or deficit in any fiscal year for which appropriations are made by prorating without discrimination against any department, institution, commission or other State agency, the available revenues among the various departments, institutions, bureaus, boards, commissions and other State agencies. In other words, the said appropriations shall be payable in such proportion as the total sum of all appropriations bears to the total revenues estimated by the Governor as available in each of said fiscal years. The purpose of this provision is to insure that there shall be no overdraft or deficit in the several funds of the State at the end of a fiscal year, and the Governor is directed and required to so administer this Act as to prevent any such overdrafts or deficits (Acts of Alabama, 1932, No. 37, pp. 44-45).

Thus, Section 19 provided that appropriations, with a few stated exceptions, are not available for expenditure until allotted. It became the function of the governor to prevent any threatened overdraft. Appropriations were to be apportioned so that the money actually appropriated to any state department is in the same proportion to the total appropriation as the budgeted amount is to the Governor's estimate of total available revenue.

> During the early years this proved to be the most single important provision in the Fletcher Act; in fact, in the minds of many Alabamians, it is the budget act. . . . This formula at first glance appears to be a perfectly clear one, requiring little or no interpretation. However, such did not prove to be the case. The relatively extensive litigation and the subsequent effects of judicial interpretations of this provision proved to

be exceedingly important in the years immediately following (Alyea, p. 19).

Proration, 1932. The legislature had not fully understood the complexities of putting the state on a 100 percent pay-as-you-go plan requiring the scaling down of all expenditures to fit expected revenues. The comptroller made his first budget estimates on November 26, 1932, with the following adjustments necessary to the General Fund:

Estimated revenues	$6,680,358.33
Appropriations (including transfers)	$7,791,604.66
Estimated deficit	$1,111,246.33
Percentage reduction required	14.26%

The condition of the Alabama Special Educational Trust Fund required the following adjustments:

Estimated revenues	$2,655,550.00
Transfer from General Fund	$1,500,000.00
Total Estimated Revenues	$4,155,550.00
Amount appropriated	$4,980,167.08
Estimated deficit	$ 824,617.08
Percentage reduction required	16.57%

On the basis of these figures and the understanding of the Budget and Control Act in Section 19, all agencies funded through the General Fund would have their appropriations reduced by 14.26 percent. The ASETF would be reduced 16.57 percent. However, since the ASETF relied on a transfer from the General Fund, its transfer of ' $1.5 million would be reduced to $1,286,100, increasing its deficit to $1,038,517.08 or 20.86 percent. Therefore, in the initial stage, state education dollars were prorated twice (*Comptroller's Report*, November 26, 1932).

Attorney General Opinions on Proration, 1932. Unfortunately, this dilemma was only the beginning. On December 1, 1932, the comptroller wrote the attorney general for clarification on the following questions of proration:

(1) Is a statutory salary subject to proration?
(2) Are appropriations to departments whose only appropriations are for statutory salaries subject to proration?
(3) Where a lump sum appropriation to a department includes in part statutory salaries, is this lump sum appropriation subject to proration in whole or part?
(4) Is the Governor's contingent fund subject to proration?
(5) Is the Governor's interest contingent fund subject to proration?
(6) Is the Governor's emergency fund subject to proration?
(7) Does the provision of the Fletcher Act excepting per capita appropriations to eleemosynary and correctional institutions include the Convict Department? The State Training School for Girls?

With the single exception of question No. 3, the answer from the attorney general was no (*Attorney General's Report*, October 1, 1932 - September 30, 1934, pp. 101-103).

The result of this ruling was that there were now two classes of appropriations—those which were fixed and not subject to proration, and those which were subject to proration. As a result, the $1.5 million due to the ASETF from the General Fund became $862,950, a reduction of 42.67 percent which, in turn, reduced the total ASETF to 29.35 percent of its appropriation.

As the comptroller continued to make further estimates of revenue, it became clear that the revenue predictions of November 26, 1932, could not be reached. A further opinion was asked of the attorney general by the comptroller "to determine those functions which must

be maintained." The attorney general replied on May 1, 1933, by constructing a classification of essential and nonessential services of government, even though the Fletcher Act made no such reference:

> ". . . essential functions of government are the protection of life, liberty, and property; the orderly settlement of disputes between the subjects by Courts properly constituted, the suppression of domestic disorders and the repelling of foreign invasions; and also the punishment of crime and the punishment for the violation of statutes regulating human conduct (*Attorney General Reports,* 1932-34, pp. 220-223).

Under these conditions, the appropriations for 1932-33 were prorated, with certain state functions favored over others. Table 4-3 as follows details the proration of government spending for 1932-33. It is interesting that one area, the judicial branch, actually received over 100 percent of its appropriations, while the Public School Fund and the ASETF received only 9.25 percent of their appropriations.

Table 4-3

General Fund Appropriations and Net Disbursements for the Fiscal Year Ending September 30, 1933

Functions	Appropriation Totals	Net Disbursements	Net as Percent
1. Legislature	$173,788.26	$173,788.26	100.00%
2. Executive & Administrative	458,879.74	388,412.97	84.64%
3. Judicial	390,161.89	391,997.76	100.47%
4. Election Expense	70,800.00	57,184.03	80.77%
5. General Government Buildings	37,331.25	25,651.77	68.71%
6. Law Enforcement	68,040.00	67,544.44	99.27%
7. Business Regulation	148,837.50	95,931.36	64.63%
8. Conservation of Health and Sanitation	531,927.50	323,118.18	60.74%
9. Development & Conservation Of Natural Resources	41,900.00	25,118.44	59.95%
10. Charities, Hospitals and Corrections	1,691,998.67	1,353,153.90	79.97%
11. Public Education:			
A. Public School Fund	500,000.00	46,250.00	9.25%
B. ASETF	1,500,000.00	138,750.00	9.25%
C. State Superintendent of Education	5,800.00	5,800.00	10.00%
D. State Board of Education	52,700.00	26,048.32	49.43%
12. Alabama Institute for Deaf and Blind	192,916.00	192,916.00	100.00%
13. World War Scholarships	1,800.00	591.13	32.84%
14. Recreation	3,750.00	525.00	14.00%
15. Interest	885,595.00	689,426.44	77.85%
16. Grants and Obligations	306,725.79	306,725.79	100.00%
17. Governor's Emergency Fund	100,000.00	303.50	0.30%
18. Pensions	210,111.81	210,111.81	100.00%
19. Debt Service Payments:			
A. Temporary Loan	n.a.	300,000.00	n.a.
B. Previous Year's Warrants	911,421.65	911,421.65	100.00%
20. Miscellaneous Refunds	n.a.	148.65	n.a.
21. Miscellaneous Transfers	n.a.	2,147.17	n.a.
TOTAL	$8,284,085.06	$5,733,066.57	69.21%

Source: *Alabama's Balancing Budget,* by Paul Alyea, 1942, p.36.

Significant outcomes of the first year of operation under the Budget and Financial Control Act included a balanced budget, the establishment of statutory salaries not being subject to proration, and the distinction between essential and nonessential functions of state government. The disaster for education, after suffering through inadequate funding already due to the Depression of 1929, was that it was deemed a nonessential function of state government. Perhaps the greater tragedy of this was that the legislature abdicated through the Budget and Financial Control Act the proper responsibility to determine for itself the essential and nonessential functions of state government. Instead, such a major responsibility fell to a single executive officer, the attorney general (Alyea, pp. 37-40). However, the decision of the state attorney general would not go unchallenged.

State Supreme Court Decision on Proration: *Abramson v. Hard, 1932.* The policy for making deficiency allotments under Section 19 of the Budget and Financial Control Act as construed by the attorney general and executed by the comptroller was challenged in a taxpayer's bill by W. A. Abramson and Elizabeth Baldwin Hill against J. H. Hard, Jr., comptroller, and S.H. Blan, state treasurer. Abramson and Hill sought to enjoin the state comptroller from drawing, and the treasurer from paying, warrants on the balance of general funds until warrants were drawn for certain educational appropriations in the amount of their pro rata share of revenues available. Judge Walter B. Jones of Montgomery County Circuit Court, denied this injunction. When appeal was filed with the Alabama Supreme Court, the justices all declared that none of them was competent to sit on the case. This disqualification was because proration made according to the statutory formula of the Fletcher Act, strictly constructed, would necessarily reduce the salary of every official of the state, including Supreme Court justices. The governor then appointed a special court consisting of five members of the bar to hear the case (*Abramson v. Hard,* 229 Ala. 3, 155, So. 590).

This special Supreme Court also denied the injunction:

> To fixed salaries and to other fixed expenses, such as the per them allowed to officers for traveling expenses, both of which are appropriations to the officers to whom they are due rather than to any department, institution, bureau, board, commission, or other state agency, the proration provisions of this act have no application....
>
> There are, however, some of the necessary expenses of government which in their nature cannot be definitely determined with exactness

> in advance, as to which the Legislature has evidenced its intent in our opinion, that they shall be paid in full, and to that end has set apart out of the general funds an amount which is to be used insofar as it is needed to pay these expenses in full. Appropriations for the payment of such governmental expenses do not differ essentially from fixed salaries or other fixed expenses. They are to be paid in full, so far as needed for payment of the specific governmental expenses for which they have been appropriated. Such expenses as the expense for fuel, light, and water, for postage, post office box rent, for repairing and insuring state property, for public printing, for telephone and telegraph service, for publishing the Governor's proclamation, for premiums on officials bonds, for distributing public documents, for feeding prisoners, for arrest of absconding felons, for removal of prisoners, and others that might be mentioned are of this character, and it seems clear that the appropriations made for such specific purposes were intended by the Legislature to be paid in full and the appropriations to their full extent here set apart and were intended to be used so far as needed to pay them in full. On similar principles those appropriations setting apart specific amounts to take care of interest on the public debt and to provide for contingencies and emergencies were intended to set apart the specific amount fixed therein to be used for the purposes specified insofar as they are needed.
>
> No appropriation of this character is, in our opinion an appropriation to any department, institution, bureau, board, commission, or state agency "for the administration, operation, or maintenance" thereof within the meaning of

> the Budget Act so as to be subject to allotment and proration. (*Abramson v. Hard*, 229, Ala.,11.)

All of the special justices concurred in upholding the lower court's decision and, in effect, affirmed the distinction previously made between essential and nonessential functions of state government. In 1935, the legislature would attempt to make education an essential function through the Tucker Act, a discussion of which will follow.

Refinancing State Government, 1932

Governor Miller, having received the Brookings Report on the condition of state government on June 11, 1932, accepted the desperate financial plight of the state. The time for action had come. In the special session of August 16, 1932, he presented the legislature a plan for refunding the state debt:

> We must face facts and not fancy screens. The current debts of Alabama have reached and passed the Twenty Million Dollar Mark. The credit of the State must not be lost. The debts must be paid or arrangements made to pay them. They have been accumulating yearly for nearly for over a quarter of a century—since about the year 1907. There has been in recent years no budget balancing. The appropriations grew larger year by year and the income failed to keep step; hence the gradual growth of the deficit. Each Legislature appropriated more than the revenue produced thereby increasing appropriations and decreasing revenue annually and causing a growing deficit. Banks call it overdrafts.
>
> This must end. The debts must be paid. The budget must be balanced. For the debts you and the Executive are responsible only in a small degree; but we are not met face to face with the responsibility to pay or arrange to pay the debts,

> and to balance the budget, so we can live within our income (Miller, August 16, 1932, p. III).

Noting that ad valorem taxation had been the primary source of government revenues in the post, Governor Miller stipulated that no such additional levies should be added; instead, he proposed that such levies be lowered in the future. Searching for other forms of taxation, he discussed a sales tax on all retail sales. He declared this form of taxation to be a consumer's tax on those now "battling for bread, hunting for food, seeking clothes."

Rejecting the sales tax, he proposed that to raise taxes, the legislature should go to those who have made money, who had money, and who had the ability to pay. Profits and incomes had never been taxed in Alabama. Governor Miller noted that although there had been no federal income tax until 1916, since its inception a total of $133,067,985 had been paid by Alabama corporations and individuals to the federal government. He proposed an income tax in Alabama modeled after the federal income tax which could, in a few years, pay off the current debts, assist in running the schools, and gradually reduce the ad valorem tax on real and personal property (Miller, August 16, 1932, pp. V-VI).

To accomplish this, Governor Miller proposed a constitutional amendment to authorize a 20 million dollar bond issue to pay off the current debts of Alabama as of October 1, 1932, and an income tax amendment to pay the annual interest on this debt and the balance to supplement the educational trust funds for school purposes. He stressed the need for the income tax for education:

> Alabama's greatest asset is her children. Fifteen Million Dollars practically of this Twenty Million Dollar debt is due to education. Nearly five million of this debt is due the teachers for earned salaries.

These debts must be paid. My plan for paying and arranging to pay them has been fully stated to you.

The Educational Trust Fund taxes now aggregate an annual income for school purposes of practically Six Million Dollars. If this Six Million Dollar annual school trust fund is used to pay the Fifteen Million Dollar school debts, then it will take two and one-half years to pay it and during that time the schools would receive no state aid and would close or shorten their sessions. If the income tax and bond amendments are submitted and approved this will arrange to pay the entire school debts, add considerable sum to the school fund, and leave the Six Million Dollar Educational Trust Fund free and clear from the school. Reduction in salaries, appropriations and abolishing useless officers, employees and departments will lift some of the burden off the General Fund and permit the schools to participate therein (Miller, August 16, 1932, p. VII).

In addition, the governor proposed budgetary control measures that were embodied in the Budget and Financial Control Act, discussed earlier.

Income Tax Amendment, 1932. One of the most significant efforts to finance the state came in 1932, when the legislature approved an act proposing amendment to the Constitution to levy an income tax:

> The Legislature shall have the power to levy and collect taxes for State purposes on net income from whatever source derived within this State including the incomes derived from salaries, fees, and compensation paid by the State, County, Municipality, and any agency or creature thereof for the calendar year 1932, and

> thereafter, and to designate and to define the incomes to be taxed and to fix the rates of taxes (Acts of Alabama, Extra Session 1932, No. 8, p. 8).

The act was approved on August 30, 1932, and submitted to the voters for referendum on November 8, 1932, just four days after the legislature adjourned. The measure was defeated by the people. On January 31, 1933, Governor Miller again called the legislature into Special Session to consider a new amendment:

> . . . .The plans proposed and provided by you—an income tax and bond issue amendments to the Constitution—to pay these debts and to keep schools from closing, were defeated by the voters at the polls on the 8th day of November, 1932.
>
> This in effect was a repudiation of the debts and the plan of payment; but it was not, in my opinion, so intended by the electorate. The real issue was not made clear and plain to them. Much false propaganda mislead them. They had no time to consider it. You adjourned at midnight on the 4th of November and the election was on the 8th of November. You could not in that time—3 days—present the facts to the voters.
>
> The voters had only one chance at the income tax amendment and this was four days after you adjourned. They should have another right and opportunity to pass on it, more than ninety days after you adjourn, as the Constitution directs. Give the voters an opportunity to see the real issue, to realize the struggle "the able to pay taxes" are making to avoid paying their reasonable share of the taxes and to keep the burden of taxes on those "unable to pay it (Miller, January 31, 1933, pp. V-VI)."

On April 7, 1933, the legislature approved an income tax amendment which was significantly different from the one previously submitted: (1) whereas the former did not fix the rate of taxation, the latter fixed the rate for individuals at five percent and for corporations at three percent; (2) whereas the former did not provide for exemptions, the latter provided exemptions in the amount of $1,500 for an unmarried person, $3,000 for a married couple, and $300 for each child under 18 years of age (Acts of 1933, Extra Session, No. 125, p. 116). These conditions made the income tax more acceptable to the voters, and with the deteriorating financial condition of education in the state, Amendment 25 was passed and proclaimed ratified July 18, 1933. The amendment follows:

> Article XXII. The Legislature shall have the power to levy and collect taxes for state purposes on net incomes from whatever source derived within this state, including the incomes derived from salaries, fees and compensation paid from the State, County, Municipality, and any agency or creature thereof, for the calendar year, 1933, and thereafter and to designate and define the incomes to be taxed and to fix the rates of taxes provided that the rate shall not exceed 5 percent nor 3 percent on corporations. Income shall not be deemed property for purposes of ad valorem taxes. From net income an exemption of not less than fifteen hundred dollars ($1,500.00) shall be allowed to unmarried persons and an exemption of not less than three thousand dollars ($3,000.00) shall be allowed to the head of a family, provided that only one exemption shall be allowed to husband and wife where they are living together and make separate returns for income tax. An exemption of not less than three hundred dollars ($300.00) shall be allowed for each dependent member of the family of an income tax payer under the age of 18 years. The legislature shall reduce the ad valorem tax from time to time when and to such an amount as the revenue derived from the income tax will justify. In the event the legislature levies an income tax, such tax must be levied upon the salaries, income, fees, or other compensation of state, county and municipal officers and employees, on the same basis as such income taxes are levied upon other persons. All income derived from such tax shall be held in trust for the payment of the floating debt of Alabama until all debts due on October 1st, 1932 are paid and thereafter used exclusively for the reduction of state ad valorem taxes (Constitution of 1901, Amendment No. 25).

Rates Fixed on Individual and Corporate Income Tax, 1935. The General Revenue Act of 1935 provided the rate of taxation for both individual and corporate incomes, not to exceed the maximum rates of five and three percent respectively as stipulated by Amendment 25, 1933.

Individual Income Tax.

> Section 345.3. Tax on Individuals. The tax herein levied and imposed upon every resident of this State, which tax is in addition to all other taxes imposed by this Act, and which tax shall be assessed, collected and paid annually upon and with respect to his entire net taxable income as herein defined and shall be computed at rates as follows: (a) On the excess over the amount exempted herein, up to and including one thousand dollars ($1,000.00), up to and including three thousand dollars ($3,000.00),

> three per cent (3%). (c) On the excess over the amount exempted herein above three thousand dollars ($3,000.00) up to and including five thousand dollars ($5,000.00) four and one-half percent (4-½%). (d) On the excess over the amount exempted herein above five thousand dollars ($5,000.00), five per cent (5%) .... (Acts 1935, Regular Session, No. 194, p. 256).

The tax rate provisions of this act have been carried unchanged through the Code of 1940 into the Code of 1975 as Section 40-18-5.

Corporate Income Tax.

> Section 345.24. Imposition of Income Tax on Corporations. A tax is hereby levied and imposed upon every corporation organized under the laws of Alabama, which shall be assessed, collected and paid annually for the taxable year 1935 and for each taxable year thereafter upon and with respect to their entire net income as hereinafter defined, at rate as follows: Three per centum of the amount of the entire net income in excess of the credits against such net income provided herein. A like tax of three per centum of the entire net income is hereby levied and imposed upon every foreign corporation during business in the State of Alabama which tax shall be assessed, collected and paid for the taxable year 1935, and for each taxable year thereafter upon and with respect to their entire net income as herein defined ... (Acts of 1935, Regular Session, No. 194, p. 256).

The rate of three percent remained until 1963, when it was changed to five percent (Acts of 1963, Second Special Session, No. 104, p. 284). This amended rate of taxation was then carried unchanged into the Code of 1975 as Section 40-18-31.

Warrant Amendment, 1932. The failure of past legislatures to properly budget expenditures and raise sufficient revenues to pay appropriations resulted in a cumulative excess debt over assets of $13,096,633.27 by September 30, 1931. The borrowings of the teachers' colleges, the A & M Institute, and the Alabama School of Trades added an additional $906,733.22 to this floating debt. Added to this sum, the anticipated General Fund deficit of $6,419,340 for the 1931-32 fiscal year resulted in a total floating debt of $20,422,706.49, which was required by law to be liquidated by September 30, 1932 (Brookings Institute, Vol. 3, p. 20).

The incurrence and administration of debt by the state had been addressed in Article XI, Section 213, of the Constitution of 1901:

> After the ratification of this Constitution no new debt shall be created against or incurred by this State, or its authority, except to repel invasion or suppress insurrection, and then only by a concurrence of two-thirds of the members of each House of the Legislature, and the vote shall be taken by yeas and nays, and entered on the Journals; and any act creating or incurring any new debt against this State, except as herein provided for, shall be absolutely void; provided the governor may be authorized to negotiate temporary loans never to exceed three hundred thousand dollars, to meet the deficiencies in the treasury, and until the same is paid no new loan shall be negotiated; provided further that this section shall not be so construed as to prevent the issuance of bonds for the purpose of refunding the existing bonded indebtedness of the State (Constitution of 190 1, Article XI, Section 213).

Under these provisions, it appears certain that the floating debt was contrary to the intent of the constitution. However, by using the $300,000 authorized to the governor's office, the governor had been able to pay the interest and renew the debt yearly.

As previously stated, a direct cause of the floating debt had been the creation of the ASETF in 1927. The 1927 legislature had doubts as to whether the taxes levied in the creation of the ASETF would be adequate to fully fund the continuing provisions of the Unified Education Budget of 1927 (Act 1927, Regular Session, No. 382, p. 445). In anticipation of this shortfall, the legislature had provided for relief from the General Fund:

> Section 31. The several appropriations herein provided for shall be payable out of the special trust fund created and set apart for educational purposes by Section 2 of the General Revenue Bill of 1927; and in the event such trust fund is insufficient to cover said appropriations, then the balance of the same shall be payable out of any other funds in the treasury not otherwise appropriated (Acts 1927, Regular Session, No. 382, p. 442).

It is clear that the educational aims of the 1927 legislature were not adequately funded through new revenues and thus became the major component of the floating debt.

To pay off the floating debt of the state and reestablish financial integrity, in 1933 the legislature passed a constitutional amendment to accompany the income tax amendment, which would provide state government with the proceeds of the income tax and legally repay all loans. The so-called "Warrant Amendment" was presented to the people on July 18, 1933, and proclaimed ratified as Amendment 26 on August 2, 1933:

> After the ratification of this constitution, no new debt shall be created against, or incurred by the state, or its authority except to repel invasion or suppress insurrection, and then only by a concurrence of two-thirds of the members of each house of the legislature, and the vote shall be taken by yeas and nays and entered on the journals; provided, the governor may be authorized to negotiate temporary loans, never to exceed three hundred thousand dollars to meet the deficiencies in the treasury, and until the same is paid no new loan shall be negotiated; (provided, further, that this section shall not be so construed as to prevent the issuance of bonds for the purpose of refunding the existing bonded indebtedness of the state. Provided, further, that this section shall not be so construed as to prevent the governor from paying interest at the rate of not exceeding 5% per annum payable semiannually from July 1, 1933, on the floating indebtedness of the state at the close of business on September 30, 1932, as shown by outstanding and unpaid warrants drawn on the treasury, as provided by law, amounting in the aggregate to $16,943,357.12 and items enumerated in an act of the legislature number 294, being senate bill 272, approved November 9, 1932 (Acts 1932, Ex. Session., p. 298), all of which are hereby ratified and confirmed.) All warrants and/or instruments issued or to be issued representing such indebtedness shall be a direct obligation of the state, and for the prompt and faithful payment of the principal and interest thereon, the full faith and credit of the state is hereby irrevocably pledged, and such warrants and/or instruments shall be exempt forever from all taxes of every kind. Any act creating or incurring any new debt against the state, except as herein provided for, shall be

absolutely void. To create a sinking fund for the prompt and faithful payment of the floating indebtedness of the state, and interest thereon, the net proceeds of any income tax which may be levied by the legislature pursuant to law is hereby pledged. To prevent further deficits in the state treasury, it shall be unlawful from and after the adoption of this amendment for the state comptroller of the state of Alabama to draw any warrant or other order for the payment of money belonging to, or administered by, the state of Alabama upon the state treasurer, unless there is in the hand of such treasurer money appropriated and available for the fan payment of the same. In case there is, at the end of any fiscal year, insufficient money in the state treasury for the payment of all proper claims presented to the state comptroller for the issuance of warrants, the comptroller shall issue warrants for that proportion of each such claim which the money available for the payment of all said claims bears to the whole, and such warrants for such prorated sums shall thereupon be paid by the state treasurer. At the end of each fiscal year all unpaid appropriations which exceed the amount of money in the state treasury subject to the payment of the same after the proration above provided for, shall thereupon become null and void to the extent of such excess. Any person violating any of the provisions of this amendment shall, on conviction, be punished by a fine of not exceeding five thousand dollars, or by imprisonment in the penitentiary for not more than two years, one or both, at the discretion of the jury trying the same, and the violation of any provisions of this amendment shall also be ground for impeachment (Amendment 26, Constitution of 1901).

Depression Disbursements. After a century of statehood, a financial house of cards had collapsed:

> It was not until the great depression of the early nineteen-thirties that the State was forced into a thorough-going financial readjustment (Ray, p. 84).

By 1930 predepression disbursements had peaked. As shown in Table 4-4, if the total disbursements for 1930 are taken as a base at 100 percent then disbursements stood at 69.4 percent in 1932 and at 66.0 percent in 1933. By 1935, they had recovered to 83.1 percent. The Budget and Financial Control Act had begun operation in 1933 and was the last nail in the coffin of the floating debt. While many General Fund and ASETF disbursements were reduced drastically in 1933, legislative and judicial disbursements were not affected by the depression. Health disbursements, as well as educational ones, were declared "nonessential" and bore the full brunt of proration. But even before the depression, the growth of schools in Alabama had not been rapid. Both government leaders and the people regarded education as a burden, and only meager support for it was gained after World War I. As a result of this attitude, by 1930 every aspect of education in Alabama had come to depend heavily on state funding, and this dependence aggravated the financial blow of having over one-half of these funds withdrawn in the course of three years (Ray, p. 85-89).

It is fair to say that schools in Alabama during the 1930s suffered not so much from discriminatory proration, as from the fact that so much state funding came from the ASETF. The reduction in disbursements for school purposes from 1932 to 1933 exceeded $5.5 million or nearly $500,000 more than the total 1930 disbursements to the other five areas of state government as shown in Table 4-4.

TABLE 4-4

Selected Depression Disbursements and Percentage Relationships of FY 1930 to FY 1935 Compared to FY 1930

Purpose	1930 Disbursement	Percentage* 1930	1932	1933	1935
General Government	$1,544,356.14	100	94	92	113
Protection	536,900.73	100	63	49	63
Conservation	1,035,226.57	100	57	40	50
Health and Sanitation	633,851.77	100	112	39	65
Hospitals and Institutions	1,281,249.19	100	93	78	82
Schools	11,586,738.93	100	94	46	68

*to the nearest fraction
Source: Ray, p.88

While it is correct that schools suffered the greatest dollar loss during the depression, Table 4-4 also illustrates that other areas of state government were penalized to a greater degree in terms of percentage. The stabilizing influence of the Public School Fund assisted schools greatly during the depression and prevented the total disbursement from falling lower than it did. Table 4-5 shows the rapid recovery of the Public School Fund by 1935, while other categories such as higher education, the Equalization Fund, and the Attendance Fund continued to face financial ruin. By 1935, some items in Table 4-5 received no funding, but were absorbed into other amounts.

From the depression disbursement experience, it can be concluded that many of the reductions occurred through the contraction of revenues earmarked for particular functions and services declared to be nonessential. The result of the experience was renewed impetus for earmarking of revenues, with agencies and services preferring since the depression to avoid dependence on the General Fund. Of the tax changes made from 1930 to

the levy of the sales tax in 1936-37, only the proceeds of the inheritance tax were earmarked for the General Fund. Other revenues were reserved for other uses: the gasoline tax for highways, tobacco and sales taxes for education, mileage taxes for the motor carrier fund, and the income tax for service of warrant refunding bonds. Thus, the advantages of new taxes precipitated by the depression accrued to highways, education, and debt service. Distrust of the administration may be less of an underlying cause of excessive earmarking than the desire of agency administrators to achieve independence from the legislature (Ray, pp. 91-99).

TABLE 4-5

Major School Disbursement Items and Percentage Relationships of FY 1930 to FY 1935 Compared to 1930

Purpose	1930 Disbursement	Percentage* 1930	1932	1933	1935
Public School Fund	$ 4,460,030.40	100	104	59	85
Institutions of Higher Education	2,974,428.65	100	73	28	34
Public School Equalization	900,000.00	100	100	49	0
School Attendance Fund	851,678.50	100	100	49	0
County High School	726,875.39	100	100	48	232
Vocational Education	496,678.78	100	127	57	80
Erecting and Repairing Rural Schools	353,957.00	100	88	7	24
Bonus School Fund	257,000.00	100	100	51	0
Teacher Training and Certification	205,032.99	100	98	33	41
Education Revolving Fund	91,020.91	100	110	54	0
Removal of Illiteracy	57,730.25	100	61	9	11
State Board of Education	47,961.78	100	95	185	172
Industrial Rehabilitation	41,703.25	100	121	53	57
All Other	122,641.03	100	23	10	554

*To the nearest fraction
Source: Ray, p.90

Effects of Refinancing Measures, 1932-34. The Warrant and Income Tax Amendments were evidence that the people of Alabama were willing to see that the state met its just obligations. While most of the $20 million bond issue thus authorized was to pay state debts for education, the bond issue did nothing for the 1934 status of educational financing. Paying off old debts did not alleviate the lack of funding under the Budget and Financial Control Act. State Superintendent A.F. Harmon characterized the situation in 1932-33: "So far as education is concerned, financial chaos more aptly describes our condition. The financing of education in Alabama is far from a settled question. More is the wonder, and great should be the praise for all those who had their share in it, that our public school system has not completely broken down. Their endurance passeth understanding (*Annual Report*, 1933, Part I p. 18)."

For the 1932-33 school year, only 46 percent of the ASETF appropriations and 71 percent of the anticipated revenues from the Public School Fund were paid by the state. As a result of the Budget and Financial Control Act, these unpaid appropriations ceased to be an obligation of the state. The efforts to create a minimum school term of seven months were wasted as Alabama looked forward to an average elementary school term of four months and an average high school term of four and one-half months for 1933-34. Only with financial aid from the Federal Emergency Relief Administration to supplement local, county, and state funds for rural elementary schools was there a school term at all (*Annual Report*, 1933, Part I, pp. 18-21). By the 1933-34 school year, conditions had not improved. It appeared that only 58 percent of the ASETF appropriations would be available to the schools. Concern continued to grow over the effects of the Budget and Financial Control Act:

> The Budget and Financial Control Act is sound in principle. It does not solve the problem of financing education in Alabama. To solve the problem of financing education, revenues must be provided to pay appropriations in full, laws must be enacted to place education among the essential functions of government and the budget act must be revised to make possible sound budgetary procedure with respect to education (*Annual Report*, 1934, Part 1, p. 41).

As is seen in Table 4-6 below, conditions in education, which had improved from the Unified Educational Program of 1927 to a high point in 1929-30, had deteriorated. The term length had decreased to 128 days, well below the 140-day minimum term expected. The expenditure per pupil and teachers' salaries declined drastically.

Table 4-6

Significant Facts Regarding Education From 1927-28 Through 1932-33

Year	Length of Term in Days	Number of Teachers	Number of Pupils Enrolled	Current Expense	Current Expense Per Pupil Enrolled	Average Annual Salary Per Teacher
1927-28	148	16,795	635,290	$15,678,340	$24.68	$726.00
1928-29	149	17,412	638,358	17,049,716	26.71	750.00
1929-30	150	17,130	622,988	17,444,674	28.00	761.00
1930-31	148	17,227	630,388	17,255,508	27.37	734.00
1931-32	147	16,704	639,836	15,658,106	24.47	682.00
1932-33	128	16,424	600,765	11,535,185	19.20	488.00

Source: *Annual Report*, 1934, p. 43.

Temporary Federal Relief. It was abundantly clear that the three major legislative efforts of the 1931 quadrennium, the Budget and Financial Control Act, the War-

rant Amendment, and the Income Tax Amendment had not solved the financial plight of education. Only one source of financial relief could be found, the Federal Emergency Relief Administration. As the 1934 *Annual Report* shows, relief was badly needed:

> During 1932-33 many Alabama schools were forced to close abruptly in the midst of the term because of lack of revenues. The school term for the state for that year was only 128 days. Many teachers went unpaid during a part of that time. Again in 1933-34 schools faced the year with such limited finances that there was little prospect for a normal term in many counties and cities, no matter how drastically expenses were curtailed (*Annual Report*, 1934, Part I, pp. 51-52).

By January of 1934, it was clear that all schools would be closed in 24 counties and in 12 cities. Under the provisions of the Federal Emergency Relief Administration, school terms could be extended with federal funds in counties and cities under 5,000 population if all state and local funds were exhausted. Only teachers whose salaries comprised their sole source of income were eligible for employment. Federal relief funds in the amount of $1,971,982.21 were actually used in extending school terms. In all, some 39 of the 67 counties, 22 of the 24 cities under 5,000 population, and the 11 state secondary agricultural schools used federal relief funds for payment of salaries for teachers for periods extending from six days to 4.9 months (*Annual Report*, 1934, Part I, pp. 5 153). But this relief was only a temporary stopgap measure and would not be available in the next academic year. The worst conditions ever to befall education in Alabama were just around the corner.

The 1935 Quadrennium

In campaigning for his second term in 1934, Bibb Graves stood on his previous educational record. He asked for d minimum school term of seven months for all Alabama children and the full payment of teachers' salaries. With the return of normal economic conditions he advocated free textbooks for the public schools. He stressed his opposition to the sales tax and increased taxes, but went on to say that he would balance the budget, pay the state's debts, and run the schools (Cain, pp. 56-57).

Bibb Graves Re-elected, 1935

Bibb Graves was inaugurated as governor for the second time on January 14, 1935. However, it was his predecessor, Governor Miller who addressed the legislature on January 8, 1935, for the opening session of the 1935 quadrennium. Miller recounted the Budget and Financial Control Act, the Income Tax Amendment, and the Warrant Amendment as great achievements of his administration and the people of Alabama. He noted that the state budget was balanced, that there was a cash balance in the treasury, and enough anticipated revenues "if economically administered, to defray the expenses of the government."

> The educational financial trouble in Alabama is not due to the State but grows out of the fact that some of the County, district and City Boards of Education have anticipated and spent the County, District and City taxes for years before they were received. Beautiful buildings were erected on credit and the future taxes were pledged to meet annually the interest and principal on the building debts. When the County, District and City taxes were collected, in many instances they are applied to the pay-

ment of building and school bus debts and the teachers go unpaid on account thereof.

An annual budget balancing system with teeth in it and penalties attached should be made applicable to these county and city boards of education, just like it applies to the State of Alabama. When that is done you can expect business results from our Educational system and teachers will be paid their salaries (Miller, January 8, 1935, pp. XVI-XVIII).

A different tone, however, was set in the inauguration speech of Governor Bibb Graves. He promised a progressive administration that would stress human welfare as the primary objective of his administration:

> Human welfare is the fixed star that sets the course of America's ship of state. That ship's greatest captain, Franklin D. Roosevelt, with clear eye and firm hand, is keeping us steadfastly on the course and that course is the only sure way to peace and safety, to prosperity and happiness, at and abroad *(Alabama Journal,* Montgomery, Alabama, January 14, 1935, p. 38).

In his address to the legislature on May 7, 1935, Governor Graves again stressed his concern for human welfare:

> We advocate the continuous responsibility of government for human welfare and especially the protection of children (Graves, May 7, 1935, P. xiii).

He continued that "We must provide for Alabama a functioning government with stress on schools and health." In order to provide adequate financing for state government and education Graves asked the legislature to pass a revenue bill during the session beginning May 7 and to postpone appropriations until after a recess. It was

his feeling that a more intelligent decision on financial needs could be made in August.

The Financial Conditions of Education, 1935-36

With the failure of the Tucker Act, an attempt to end the financial discrimination against education, in 1935, the excessive proration under the Budget and Financial Control Act continued as it had since 1932. Although three major acts would be passed during the August 16, 1935, session creating a minimum foundation program and improved local budgeting, none of these measures would increase funding. And even with increased funding, without earmarking, such funds would be subject to the proration because education had been ruled a nonessential function of state government.

By February and March of 1936, schools in 51 counties had closed early with less than a seven-month school term. As late as February, 1936, teachers in many counties had received only one month's salary (Cain, p. 237). The American Legion vigorously opposed the manner in which state funds were being prorated, calling it a great injustice to pay some state employees one hundred percent while leaving schools and teachers to beg:

> Education is essential to democratic government. Ignorance is the most potent ally of autocracy, communism and other "isms' which are ever on the alert to tear down the principles for which we fought in '17 and '18 and for which our greatest organization stands. . . . The public schools are the chief bulwark to preserve the principles of Americanism. We cannot and we must not let our schools close *(Alabama School Journal,* Vol. LIII, Feb. 1936, p. 7).

The report to the governor from the comptroller on February 10, 1936, revealed the desperate financial condi-

tion of the schools, listing the following appropriations due from the General Fund for education:

Public Schools	$3,660,516.00
Higher Education	$2,231,221.61
Total	$5,891,737.61

In addition, $541,650 had been appropriated for miscellaneous nonessentials such as health for a grand total of $6,433,357.61 for nonessential functions. Revenue was anticipated to be $7,735,816.77 with essential functions claiming $6,035,384.72 and leaving a balance for nonessential functions as defined by *Abramson v. Hard* in the amount of $1,700,432.05. This meant that education would receive only 26.43 percent of the amount the legislature had appropriated and deemed necessary to operate the schools. The education appropriation was thus reduced by $4,334,463.65 (Graves, February 11, 1936, pp. III-V).

Governor Graves reported the dire circumstances to the legislature on February 11, 1936:

> I believe that we face an early collapse of our school and health programs unless effective financial relief is promptly provided. To provide this relief is the great purpose of this session (Graves, February 11, 1936, p. III).

As the 1935-36 financial year closed, the public schools were limited to a state minimum program term of only five and three-quarters months, probably the shortest in the nation. Ninety-two percent of the state's deficit was again assessed against public education. Thousands of school children failed to be promoted during this year because of the short term and were forced to repeat the year (*Annual Report*, 1935-37, Part 1, p. 23).

Parity for Education, 1935-36

During this period these were two attempts to make education a legitimately equal function of government. Both attempts ended in failure.

The Tucker Act, 1935. One such effort was made in the legislative session beginning in May 1935. The Tucker Act, approved on June 27, 1935, sought to end the discrimination against educational appropriations as decided in *Abramson v. Hard* by declaring education to be an essential function of state government. An essential function of state government would be paid first from available revenues. However, appropriations not paid to the schools at the end of the fiscal year would cease to be a debt of the state to the schools. The Tucker Act contained the following provisions:

> Section 1. The maintenance and operation of the public schools, secondary schools, normal schools, and institutions of higher learning in the State of Alabama, is hereby declared to be an essential function of State Government of equal importance with the other essential functions of State Government such as the legislative, executive and judicial departments; and the payment of salaries of the teachers and administrative officers of said schools and institutions is as essential as the payment of the salary of any officer of the State.
>
> Section 2. In the administration of that certain Act known as the Budget and Financial Control Act, approved September 27, 1932, and of any other law of the State of Alabama, no discrimination against in prorating, allotment, or payment of appropriations shall be made against any of said schools or institutions in favor of any other department, board, institution,

> commission, or other State agency, or in favor of any officer or agent of the State of Alabama, whether on a salary fixed by law or not, it being the purpose of this act to establish, in the allotment, proration, and/ or payment of appropriations for the public schools and educational institutions of the State, identity and equality of treatment, and equal priority, with the other essential departments and officers of the State Government (Acts of Alabama, 1935, No. 15 1, p. 193).

However, despite the good intentions of this act, it was declared unconstitutional. In an opinion of the attorney general on December 3, 1935, the inability of the legislature to set aside the construction of the law already applied by the courts to actual cases *(Abramson v. Hard)* was affirmed:

> A reading of this act leads to the inescapable conclusion that it was designed to overrule to the extent there indicated, the decision of the Court in *Abramson v. Hard,* supra. This is not within the power enjoyed by the legislature. . . . The effect of constitutional provisions is not thus dependent upon the will of the legislature.
>
> Act No. 151, approved June 27, 1935, is unconstitutional as violative of Sections 42 and 43 of the Constitution (*Attorney General Reports, October 1, 1935-December 31, 1935,* pp. 281-285).

An attempt to end this discrimination by constitutional amendment followed in 1936 in the Harrison Bill.

The Harrison Bill, 1936. In the wake of the failure of the Tucker Act, the legislature sought to pass a parity amendment to the constitution which would provide funds for education on an equal basis with other state functions. Strong sentiment existed among the citizens for such an

amendment, and several bills proposing it were introduced. The Harrison Bill and the Clay Bill were the two received most favorably in the legislature.

The bill which would come to be known as the Harrison Bill originated in the House of Representatives as House Bill 11 by Kelly. However, Harrison succeeded in substituting his bill for the one by Kelly on the floor of the House. This bill won House approval and was transmitted to the Senate. The following excerpt from House Bill 11 summarizes the key provisions of the bill:

> Section 1. That an amendment to the Constitution of the State of Alabama to be known and designated as Article XXIV is hereby proposed, the proposed amendment being as follows.
>
> Article XXIV. Public education is hereby declared to be an essential and primary function of government in this State. It shall be unlawful for the Comptroller or like officer of the State of Alabama to draw any warrant or other order for the payment of money belonging to or administered by the State of Alabama upon the State Treasurer unless and until it shall have been certified to such comptroller or like officer by such Treasurer that there is then in the hands of such Treasurer money available and appropriated for the full payment of the same. All appropriations now or hereafter made shall be either (a) Absolute, or (b) Conditional.
>
> (a) The following shall be absolute appropriations, shall have preference over conditional appropriations, and to the limit of the money in the hands of the Treasurer available therefor, shall be payable in fun in the order named:
>
> 1. Appropriations for payment of interest or principal or sinking fund on the public debt or on trust funds covered into the State Treasury.

2. Per capita appropriations to eleemosynary and correctional institutions and the care and maintenance of convicts.
3. Appropriations to make effective any constitutional provision setting apart any certain tax, excise, income or charge for a designated use or purpose, not including appropriations to be made from the State's General Fund.

(b) All other appropriations shall be conditional appropriations and shall be payable in full only in the event that after providing for payment of the absolute appropriations there remains in the hands of the Treasurer money available for the full payment of such conditional appropriations; and in the case there is insufficient money available for such full payment, then the money available to the limit of the money in the hands of the Treasurer available thereof, shall be prorated without any discrimination, and each conditional appropriation shall be payable in the proportion which the money available bears to the total of all such conditional appropriations. At the end of each fiscal year all unpaid conditional appropriations which exceed the amount of money in the State Treasury subject to the payment of the same, after such proration, shall thereupon become null and void to the extent of such excess (Journal of the Senate, 1936, pp. 722-723).

House Bill 11 was assigned to the Committee on Finance and Taxation, from which it was reported to the full Senate without amendment. It was here that numerous amendments were placed on the bill to make certain additional appropriations absolute rather than conditional. Among them was the Institute for the Deaf and

Blind, state gasoline taxes for the State Highway Department, and appropriations to the judiciary:

> An extensive number of amendments were attached to the Harrison Bill, and it came to naught in a conference committee late in the evening of the final day of the special session, April 17, 1936. The measure was killed by a small group of lawyers in the Senate, with the aid of Lieutenant Governor Thomas Knight, Jr., who were determined to prevent the proration of judicial salaries under the provisions of the bill. Since the bill had been amended so extensively, it would have increased discrimination against education rather than helping it. For this reason the death of the Harrison Bill was considered fortunate for Alabama schools (Cain, p. 242).

Minimum Program Enacted, 1935

Bibb Graves' promise in his 1926 campaign to provide a minimum seven-month term was partially fulfilled through the increased revenues provided by the ASETF and the Unified Educational Program. However, the intervention of the depression prohibited the fulfillment of the program. During the 1934 campaign, Graves again promised a minimum school term of seven months, requiring both increased funding and a pattern of equalization. While the legislature was receptive in 1935 to establishing such a minimum program, the enabling legislation which followed was not accompanied by a plan for increasing revenue. As has been described, education was already incapable of receiving the appropriations promised because of the Budget and Financial Control Act of 1932. A minimum educational program could not be established in every city and county school system without the needed revenues.

The legislature met again on August 13, 1935, after a recess. On September 2, 1935, the two companion acts which comprised the Minimum Program Acts were passed. The first of these acts, No. 326, was an appropriation bill; the second act, No. 295, established the rules and regulations by which the appropriated funds would be distributed and apportioned. Studies of the 67 county and 45 city school systems had indicated that the state would have to provide an equalized Minimum Program Fund of at least $6 million in addition to the Public School Fund to achieve a minimum school term of seven months. Unfortunately, the calculations were based on outdated depression-era information. The attendance data were for 1933-34, and no provision was made for growth in attendance or for adjusting teachers' salaries in proportion to training. So in spite of the good intent of the legislature of 1935, there was no assurance that the funds appropriated would be sufficient (*Annual Report*, 1935-37, Part 1. pp. 20-21).

The seven-month school term was agreed upon as the minimum program school term for several reasons. First, it had been the goal in 1927 and not reached by 1935. Second, the high schools of Alabama traditionally operated for nine months when funds were available. Many felt that the elementary schools, which traditionally operated when funds were available for seven months, should operate for nine months also. Nevertheless, the legislature could see no way to support high schools for a nine-month term and to lengthen the seven-month elementary school term to nine months. Therefore, the compromise was a minimum term of seven months for both (*Annual Report*, 1935-37, Part 1, p. 22).

Appropriation Act of the Minimum Program, 1935. Act Number 326, which provided the financial basis for the Minimum Program, had numerous shortcomings:

1. The total Minimum Program Fund appropriation of $6,042,516 was inadequate the day it was appropriated because it was calculated from 1934-35 data.
2. The additional appropriation of $3,160,516 was a conditional appropriation if money was available in the General Fund and by Section 6 subject to the Budget and Financial Control Act of 1932.
3. The additional appropriation of $500,000 to the Public School Fund was also subject to the Budget and Financial Control Act. Only the funds earmarked by the constitution could be guaranteed revenue for the schools.
4. The appropriations previously made in a separate category to equalize educational opportunity in the Unified Educational Program of 1927 were combined into one appropriation in the Minimum Program Fund.
5. The appropriations to the Minimum Program Fund, the Revolving Fund, and the State Secondary Agricultural School Fund were to be made from the ASETF when available. Of these appropriations, the only guaranteed revenues were those from taxes earmarked to the ASETF and not subject to the Budget and Financial Control Act.
6. The Minimum Program Fund is incorrectly called a fund since it has no revenue of its own, only those of the ASETF, the Public School Fund, and the General Fund (when available), and the Public School Fund.

Due to the financial constraints of inadequate appropriations and limited allotments under the Budget and Financial Control Act, the Minimum Program had no chance of being fully implemented as called for in its companion bill, No. 295. As long as the total revenues of the state were inadequate to fully fund the essential functions of state government first, there was no chance that the Minimum Program Fund could receive its full appropriation. And with the depression still being felt in Ala-

bama, there was no economic recovery in sight that would provide enough revenues through the taxes levied by the state government to fully fund appropriations. The only alternative open for providing equity to education was through additional earmarking of funds until sufficient revenues were generated to equal the total appropriations made by the legislature. Only the Previously earmarked revenues from the Constitution of 1901 and the ASETF of 1927 had saved the schools from complete financial collapse during the depression. Earmarking became the only solution because both statutory and constitutional attempts at parity had failed.

Apportionment Act of the Minimum Program, 1935. The apportionment of the appropriations to the Minimum Program Fund was to be done so as to promote equalization of educational opportunity. The promotion of equalization was a very difficult matter in Alabama in 1935 because of the wide variety of local conditions which existed:

1. The assessed valuation of property per child enrolled varied from $546 in the poorest county to $2,651 in the wealthiest county.
2. The percentage of Negro children enrolled to the total enrollment of negroes and whites varied from 0.2 of I per cent in one county to 87 per cent in another county.
3. The density of white children per square mile varied from 0.8 of a student in the most sparsely settled county to 18 in the most densely populated county.
4. Transportation and consolidation were almost completely developed in some counties while little had been accomplished in a few counties.

5. The percentage of college graduates among white teachers varied from 10 per cent in one county to 60 per cent in another county.
6. The existing state appropriations were inadequate and even these were not paid (*Annual Report*, 1935-37, Part I, pp. 18-19).

It was the purpose of the apportionment act to take these factors into consideration and promote equalization, notwithstanding the reality of item number 6 above (nonessentiality and proration).

In planning the apportionment act, the legislature kept the following principles uppermost in mind:

1. The educational welfare of a child in one section of the State is as important as the educational welfare of a child living in any other section of the State.
2. The burden which must be home in support of education should be equalized.
3. Every school unit in the State should be required to make a uniform tax effort in order to provide the minimum state term. If after taxing itself to the uniform level, a school unit still lacks sufficient funds to provide the minimum term, the remainder of the cost should be paid from the State Treasury.
4. No school system in the State should be tom down in order to build up any other system. In other words, the State should level upward, never downward.
5. Local units should be stimulated to exceed the state program whenever possible.
6. Legitimate educational needs should be scientifically calculated in order to provide for flexibility in educational programs. Furthermore, the state program of school support should be a "balanced program" in terms of providing funds for all necessary functions of educational expenditures.

7. Provisions should be made for growth in educational load.
8. Sound business procedures should be followed in administration of every school unit in the State in order that the children might get the maximum benefit per educational dollar expended, and
9. State funds should be apportioned in such a manner as to encourage the administrative efficiency of local boards of education and to discourage inefficiency (*2Annual Reports*, 1935-37, p. 20).

The apportionment act as entitled contained the following provisions:

Section 1 established the Minimum Program Fund to include all appropriations made by the legislature to the credit of the fund and any other funds set aside for that purpose, including the Equalization Fund established in 1927.

Section 2 stated two purposes of the act; one, that the fund would be used to "aid in providing at least a seven months' minimum term for all schools;" and two, that it was to "assist in the promotion of equalization of educational opportunity for all children in the public elementary and high schools." These provisions are present in Appendices 5-5 State Board of Education Regulations for the Annual Apportionment of the Minimum Program Fund for the Fiscal Year Beginning October 1, 1987, and Appendix 5-6, Statutory Provisions for the Apportionment of Education Funds to Independent Cities.

Additional Educational Legislation, 1935

The Minimum Program Acts were adopted by the Legislature without a dissenting vote. G.S. Smith, president of the Alabama Education Association, praised Governor Graves and the legislature for their efforts. He asserted

that the "passage of the Minimum Program Act of 1935 marked the greatest single step yet taken to insure equitable distribution of public funds for education" (*Alabama School Journal*, Vol LIV, May 1937, p. 19).

The School Budget Act, 1935. An additional act, the School Budget Act, was also passed on September 2, 1935, to extend the budgetary procedures imposed on state government by the Budget and Financial Control Act of 1932 to the operation of local school systems. It provided that each of the 67 county boards of education and the 45 city boards of education could not spend more for current expenses in any year than its revenue receipts for that year plus balances on hand. This guaranteed that every school board would live within its income (Acts 1935, No. 300, p. 728).

The School Warrant Act, 1935. The School Warrant Act, also passed on September 2, 1935, enabled local boards of education to clear up their floating debts by repealing all old school warrant laws and placing restrictions on refunding warrants. Authority was granted to refund any warrant at interest rates over four and one-half percent (Acts 1935, No. 302, p. 735).

The School Textbook Act, 1935. The School Textbook Act was approved earlier on July 17, 1935, to provide for state-owned textbooks for the first, second, and third grades. An initial appropriation was provided in the amount of $175,000 from any funds in the treasury not otherwise appropriated under the direction of the governor. The revenues to accomplish this were to come from a levy on tobacco products (Acts 1935, No. 201, p. 594).

Emergency Salary Appropriations, 1935. A special salary appropriation to provide funds to pay public elementary and high school teachers for the remainder of the normal 1934-35 school term was also enacted by the legislature. For those county and city school systems below 5,000 in population, and the state secondary agricultural schools, where all local, state, and federal funds available had been exhausted for salaries, the sum of $500,000 was appropriated from the state treasury to the State Board of Education. An additional stipulation was that no teacher would receive more than $60 per month for a maximum of a seven-month elementary school term or a nine-month high school term (Acts 1935, No. 212, p. 600).

The Sales Tax Enacted, 1936

The financial troubles of public education in Alabama were not over. Appropriation and apportionment plans meant nothing without adequate revenues.

The School Crisis and Proration of 1935-37.

> In spite of the increased school appropriation and other constructive school laws enacted in 1935 which had wide-spread influence, revenue receipts were insufficient to pay the appropriations. This led to proration and a school crisis which required additional legislation. The needed legislation was not passed until a second special session of the legislature was called, at which time the necessary measures were taken, and the schools returned to normal (Cain, p. 233).

School funds were again prorated during the 1935-36 and 1936-37 school years. The attempts of the Tucker Act and the Harrison Amendment to provide parity for education had failed, and Alabama remained in the grips of

the worst economic depression to strike this nation. As the school system of the state had relied on constitutional ad valorem taxation for about two-thirds of its revenue, the decrease in state property assessments by about $300 million between 1930 and 1935 sharply curtailed these funds. Assessments continued to decline during the 1935 quadrennium. Enrollment in elementary and high schools and in higher education continued to grow, further straining resources. The School Budget Act of 1935 restricted the borrowing power of local school boards. Federal relief funds which had assisted during the 1931-35 quadrennium were no longer available, and the continued discrimination under the Budget and Financial Control Act created a worsening crisis (*Annual Report*, 1936, p. 16).

The Special Legislative Session of February 11, 1936. Governor Graves called the legislature of 1935 into special session on February 11, 1936, for the purpose of relieving the financial crisis in education:

> I believe that we face an early collapse of our school and health programs unless effective financial relief is promptly provided. To provide this relief is the great purpose of this session (Graves, February 11, 1936, p. 111).

Graves reported that of the nearly $4 million appropriated by the legislature to the common schools, only 26.43 percent could be paid under the existing financial conditions:

> These schools can't run the balance of this year without the payment of the balance of these appropriations, and I pray God that you and I will not let them stop and thereby let an annual crop of Alabama children go to waste (Graves, February 11, 1936, pp. VI-VIII).

This necessity put Governor Graves in conflict with the understood message of his 1934 campaign, that he would oppose any new taxation. Now, he repeated his platform:

> The Income Tax is in our Constitution and laws by the will of the people. I will enforce it and oppose its repeal. I will oppose the Sales Tax.
>
> Experience and familiarity with our State's business on the one hand, and knowledge of the financial condition of our people on the other hand, are the efficient instruments whereby, when I am Governor, I will be able to balance the budget, pay the State's debts, run our schools, and operate an efficient Government by economy without further taxation.
>
> Should conditions make this impossible, I still promise to "PAY THE DEBTS, RUN THE SCHOOLS AND PROVIDE AN EFFICIENT GOVERNMENT' and to do so with the least possible burden on our people (Graves, February 11, 1936, Extra Session, p. VIII).

The governor called attention to this last plank in his platform and noted that it would be impossible to operate the schools without further taxation in their behalf.

Governor Graves proposed two tax changes: exemption of homesteads from the 6.5-mill state tax and other ad valorem taxes, and a luxury tax to fund education and replace revenues lost through the exemption. Graves continued his rejection of the general sales tax, believing it unfair because it taxed the necessities of life such as bread, shoes, and nails. He asked, instead, for a luxury tax on everything that is not a necessity. In addition, he suggested that the legislature increase the franchise tax on foreign corporations and consider taxes on natural gas, export power, and amusements of all kinds (Graves, February 11, 1936, Extra Session, p. IX).

This tax measure was soundly defeated in the legislature. The session ended after 25 legislative days, with Graves taking the blame:

> The people are thumbs down on a spending spree-they want thoughtful and conservative spending putting money where it will do the most good at the least outlay.
>
> Governor Graves should learn a lesson from "back home" that there is a limit to the patience and endurance of the people staggering under debt and the aftermath of depression (*Montgomery Weekly*, 1936).

The Special Legislative Session of November 23, 1936. Graves learned well from his defeat in the first extra session and immediately began planning for the second extra session. On November 23, 1936, he presented a second plan to the legislature:

1. To revise the Revenue Laws and to provide additional revenue for the schools and to enable the State, County and City governments to function adequately.
2. To provide for the payment of all educational activities, experimental and extension services, out of the Alabama Special Educational Trust Fund and to relieve the General Fund of all such payments.
3. To provide for an appropriation from the General Fund to take care of any deficit in the Alabama Special Educational Trust Fund.
4. To provide for the exemption from State ad valorem taxes of homesteads, as defined by the Constitution and Laws of the State of Alabama.
5. To set up a "Property Tax Relief Fund" and reduce State ad valorem taxes.

6. To regulate the manufacture and sale of spiritous, vinous or malt beverages through State owned and operated stores of other State supervision, and to provide a referendum thereon to the electors of Alabama (Graves, November 23, 1936, Second Extra Session, p. 11).

Graves also presented to the legislature the Zukoski Report, a study of school finance which had been prepared by a group of Birmingham businessmen headed by Charles F. Zukoski, Trust Officer and Vice President of the First National Bank of Birmingham. This group had come to Montgomery at the request of Senator Hays Tucker of Tuscaloosa and anti-administration legislators to study funding for public education. After spending three weeks in the State Department of Education, the group acknowledged the crisis in educational finance and confirmed that conditions were being accurately presented to the legislature and to the public. The report recommended an additional 3.0 mill tax to be included as a part of the Minimum Program (Graves, November 23, 1936, p. VIII).

Governor Graves recommended the enactment of an excise tax to be known as a privilege licensing tax on retail merchandising of personal property; the measure of the tax was to be one and one-half percent of the gross receipts of the merchandising business, including amusements run for pay. He projected that this tax would yield some $4.5 million the first year in new revenues. He urged that the returns from this license tax be placed in the ASETF to replace the amount that it takes to exempt homesteads from the 6.5-mill state tax. He asked that every educational and extension program from the General Fund be transferred to the ASETF and that an additional one million dollars be transferred from the General Fund to the ASETF. He also called for a bill establishing the Property Tax Relief Fund with the surplus in the ASETF to be transferred to it at the end of each year to further reduce the ad valorem tax (Graves, November 23, 1936, pp. XX-XXI).

Gross Receipts Tax Act, 1936. The legislature responded favorably to Governor Graves' proposals and approved the Gross Receipts Act on December 17, 1936:

> Section 1. Every person, firm, corporation, association, or co-partnership opening, establishing, operating, or maintaining one or more retail stores or retail mercantile establishments within the State, whether under one general management or not, shall, in addition to all other licenses or taxes of whatever kind now levied by law, pay to the State of Alabama, as a license or privilege tax for the privilege of doing such business, an amount equal to one and one-half per cent (1-½%) on the gross sales of said business.
>
> Section 3. . . . .Upon every person, firm, corporation, association, or co-partnership engaged or continuing within this State in the business of conducting places of amusement or entertainment, billiard and pool rooms, bowling alleys, theaters, opera houses, moving picture shows, vaudevilles, amusement parks, athletic contests, including wrestling and prize fights, boxing exhibitions, football and baseball games, skating rinks, race tracks, or any other place at which entertainment is offered to the public, including public bathing places, public dance halls of every kind and description within the State of Alabama, a license tax in addition to all other taxes now or hereafter levied, in an amount equal to one and one-half per cent (1-½%,) of the gross receipts of such business or places of amusement.

Section 6. That the monies derived from the license tax levied. . . .hereinabove set forth shall be covered into the State Treasury and become a part of the Alabama Special Educational Trust Fund; provided, however, that so much thereof as may be necessary, shall be charged with the replacement in the General Fund of the three-mill Constitutional levy for school the one-mill levy for Soldiers' Relief and the two and one-half mills for general purposes lost by the exemption of homesteads in the amount of Two Thousand Dollars ($2,000.00), and the Comptroller, with the approval of the Governor, is hereby directed to draw his warrants payable out of the Alabama Educational Trust Fund as herein provided in such sum as shall be found necessary to take care of and replace the three-mill Constitutional school levy, the one-mill Soldiers' Relief levy and the two and one-half mill levy for general purposes of the State ad valorem tax lost as above set forth (Acts of Alabama, 1936-37, No.1, p. 1).

This tax on gross receipts went into effect on January 1, 1937, for two months until its repeal and replacement with a substitute selective sales tax.

Property Tax Relief Fund and Homestead Exemption Acts, 1937. This provided relief for homesteads in Section 6. An act approved February 20, 1937, further defined homesteads and provided exemption:

> Section 1. The word "homestead" as herein used is the "homestead" as now defined by the Constitution and Laws of the State of Alabama.
>
> Section 2. Homesteads, as herein defined, are hereby exempted from all State ad valorem taxes beginning October 1, 1937.

> Section 3. In no case shall the exemption herein made apply to more than one person, head of the family, nor shall said exemption exceed Two Thousand Dollars ($2,000.00) in assessed value, nor one hundred sixty (160) acres in area (Acts of Alabama, 1936-37, No. 107, p. 113).

An accompanying act approved February 23, 1937, set up in the state treasury a Property Tax Relief Fund and provided for its distribution:

> Section 1. That there is hereby set up in the State Treasury a Property Tax Relief Fund to be used to reimburse the State General Fund, the State Soldiers' Relief Fund and the Public School Fund by such amounts as are lost to such funds by reason of exemption of homesteads, in whole or in part, from the payment of the State levy of twenty-five cents ($.25) on each One Hundred Dollars ($100.00) of taxable property for the State General Fund; ten cents ($.10) on each One Hundred Dollars ($100.00) of taxable property for the State Soldiers' Relief Fund and thirty cents ($.30) on each One Hundred Dollars ($100.00) of taxable property for the Public School Fund.
>
> Section 2. That the surplus over and above Seven Hundred and Fifty Thousand Dollars ($750,000.00) in the State General Fund, after all State appropriations now or hereafter payable from the State General Fund are paid in full on September 30th of each fiscal year beginning September 30, 1937, shall be transferred from the State General Fund into and become a part of the Property Tax Relief Fund.
>
> Section 3. Any surplus in the Special Educational Trust Fund on September 30th of each fiscal year, beginning September 30, 1937, remaining after all appropriation now or hereaf-

ter payable from the Special Educational Trust Fund have been paid in full, shall be transferred into and become a part of the Property Tax Relief Fund.

Section 6. Should any surplus remain in the Property Tax Relief Fund after the charges hereinabove set out have been paid off or discharged in accordance with the provisions of this Act, then the Governor is directed, by proclamation, to reduce pro rata the State levy on all State ad valorem tax assessments, and the Tax Collectors and Tax Assessors are authorized and required to enter such reduction pro rata in the assessment and collection of all State ad valorem taxes (Acts of Alabama, 1937, No. 127, p. 142).

The Luxury Tax Act or General Sales Tax, 1937. The Gross Receipts Tax Act had been in effect less than two months when it was repealed and replaced with what was called the luxury tax or the general sales tax, effective March 1, 1937. This sales tax was termed a "luxury tax" because it provided numerous exemptions for commodities, particularly some of the essential foodstuffs. The major provisions follow:

Section 2. There is hereby levied, in addition to all other taxes of every kind now imposed by law, and shall be collected as herein provided, privilege or license tax against the person on account of the business activities and in the amount to be determined by the application of rates against gross sales, or gross receipts as the case may be, as follows: (a) Upon every person, firm or corporation engaged or continuing within this State in business of selling at retail any tangible personal property whatsoever, including merchandise and commodities of every kind and character, (not including, however,

bonds or other evidences of debt or stocks) an amount equal to two per cent of the gross proceeds of sales of the business, except where a different amount is expressly provided herein. . . . .Upon every person, firm, or corporation engaged or continuing within this State in the business of selling any automotive vehicle, an amount equal to one-half of one per cent of the gross proceeds of the sale of said automotive vehicle. (c) Upon every person, firm or corporation engaged or continuing within this State in the business of conducting places of amusement. . . .an amount equal to two per cent of the gross receipts of any such business. (d) A situs is hereby declared to exist for the purpose of this Act and there is hereby levied a tax of two per cent on the fair market value of goods, wares and merchandise, motor vehicles, radio receiving sets, phonograph mechanisms, and all articles of trade imported or brought into this State by any consumer on which the tax herein levied has not been paid; provided, said goods, wares, and merchandise have terminated their movement into the State of Alabama . . . . (e) A license tax is hereby levied upon all salesmen and solicitors whose stock of goods, wares and merchandise are located without the State of Alabama and on which the tax herein levied is not paid before delivery to the consumer of the fair market value of the goods . . . . the price charged to the consumer or user for the goods, wares and merchandise shall be prima facie evidence of their fair market value (Acts of Alabama, 1936-37, No. 126, p. 125).

General merchandise was thus taxed at two percent of its selling price and motor vehicles were taxed at one-half of one percent of the net sales price. Certain exemptions, however, were provided:

Section 4. Exemptions. There are, however, exempted from the provisions of this Act: (a) Insurance companies upon which the statutes of the State of Alabama levy a tax based upon premiums. (b) Building and Loan Associations, State and National Banks, not having a capital stock represented by shares and which are operated exclusively for the benefit of their depositors. (c) Amounts received from the sale or sales of livestock, poultry and other products of the farm, dairy, grove or garden, when said sale or sales are made by the producer or members of his immediate family, or employees forming a part of the producer's organization, in the original state or condition or preparation for sale; also amounts received from the gross proceeds from the sale of cotton in bales, whether compressed or not, unprocessed cottonseed, peanuts in lots of not less than a ton, and hay in lots of a ton or more, whether such sales be made by the original producer of not, and the amount received from the sale or sales of fertilizer, seeds for planting purposes, boxes, crates, paper or cloth bags for use in preparing agricultural products for market; provided that nothing contained herein shall be construed as exempting amounts received from the sale of nursery stock or floral products. (d) Amounts received under life, sick, accident, health, fire, public liability, and property damage insurance policies. (e) Amounts received under life insurance, endowment or annuity contracts, either during the term or at maturity or upon surrender of the contract. (f) Amounts received from the sale of used automotive vehicles, which vehicles are commonly known to the trade as secondhand automotive vehicles. (g) Amounts received from the sale of textbooks used in elementary schools, high schools, and institutions

of higher learning. (h) Amounts received by hospitals, infirmaries, and/or sanitariums. (i) Provided, however, that the Provisions of Section 2 of this Act shall not apply to (1) amounts received from the sale of newspapers and agricultural or religious publications and magazines or to the sale of advertising space in said newspapers or publications, or the sale of time or the facilities of any radio broadcasting station, or to those engaged in making said sales or to indoor or outdoor advertising; (2) amounts received from the sale of gasoline, lubricating oils, other wise taxed, or from the sale of cigars, cigarettes and tobacco products otherwise taxed, or from the sale of alcoholic and/or cereal beverages upon the sale of which a tax is now or may hereafter be levied and collected as provided by law; (3) provided, however, that for the purpose of determining the amount of the license or privilege tax due by any person, firm or corporation under the provision of this act there shall be deducted from the gross sales or gross receipts of such person, firm or corporation, amounts received from the business on which or for engaging in which a license of privilege tax is levied. . . (4) Provided further that for the purpose of determining the amount of any license or any privilege tax due by any person, firm or corporation, under the provisions of this act, there shall be deducted from the gross sales or gross receipts of such person, firm or corporation the amount received from the sale of transportation, gas, water or electricity. 6) Amounts received from the sale of sweetmilk, butter-milk, corn meal, flour, dry salt sides, salt fat backs, plates, bellies, sugar and coffee, and the amounts received from the sale of lunches to school children in school buildings within the State when sold by any person or association

or group not for profit. (k) Amounts received by manufacturers, compounders, processors, producers, miners, and quarriers from sales to consumers in carload lots or in larger quantities except as otherwise expressly provided in Section I of this Act. (1) Amounts received by any person, firm or corporation from the construction, repair, towage or pilotage of vessels or barges (Acts of Alabama, 1936-37, No. 126, p. 127).

The proceeds from this new sales tax measure were again earmarked for the ASETF and the Property Tax Relief Fund with some additional beneficiaries identified:

Section 21. Before divisions and distribution, the expenses of the administration of this Act and also so much thereof as may be necessary for the replacement in the Public School Fund of the three-mill constitutional levy for schools and in the General Fund of the one-mill levy for Soldiers' Relief and the two and one-half mills for general purposes lost by any exemption of homestead provided by legislation enacted during Special Session 1936-37 of the Legislature of Alabama shall be first charges against the proceeds of said license, taxes or receipts levied or controlled under this Act. The Comptroller, with the approval of the Governor, is hereby directed to draw his warrants payable out of the total proceeds of said licenses, taxes or receipts levied or collected under this act as herein provided in such sum as shall be found necessary to take care of and replace the three-mill constitutional school levy, the one-mill Soldiers' Relief levy and the two and one-half mill levy for general purposes of the State ad valorem taxes lost as above set forth. Three-fourths of the net proceeds collected or received under the provisions

of this Act shall be covered into the State Treasury and become a part of the Alabama Special Educational Trust Fund. One-fourth of the net proceeds collected or received under the provisions of this Act shall be paid into the State Treasury to the credit of the sixty-seven counties of the State and shall be divided and distributed as follows to-wit: One-half of said proceeds shall be divided and distributed proportionately among the sixty-seven counties of the State according to the population of the said counties as shown by the last Federal Census; and one-half of said proceeds shall be divided or distributed equally among the sixty-seven counties; provided that the funds divided shall be used exclusively for full-time health services in cooperation with the State Board of Health and/or the Federal Government; for public welfare in cooperation with the State Department of Public Welfare and/ or the Federal Government; and for extension services in cooperation with the Alabama Agricultural Extension Service and/or the Federal Government; and for extension services in cooperation with the Alabama Agricultural Extension Service and/or the Federal Government, at the discretion of the Commissioners Court, Boards of Revenue, or other governing bodies of the several counties of the State (Acts of Alabama, 1936-37, No. 126, p. 125).

End of Proration, 1937

In 1936-37, for the first time in five years, one hundred percent of the appropriations due to education were paid, largely because of the consequence of earmarking a major portion of the proceeds of the sales tax for public education. State Superintendent J.A. Keller commented on this event:

I am aware of the fact that the practice of earmarking revenue is opposed by many political science experts. But in view of the rulings of our Supreme Court, which protect earmarked funds but give education last place in the State General Fund, we have no alternative (*Annual Report*, 1935-37, Part 1, p. 24).

* * *

Summary

The Alabama Special Educational Trust Fund has served to insulate public education from two types of financial failures in Alabama. The first is that since access to the local property tax — the usual source of local school funds nationwide — is so constrained by constitutional provisions, the only substantial source of funds is those from the state. In the case of the ASETF, the two growth taxes of the state — the income tax and the sales tax — are earmarked for "educational purposes only." Therefore, the only consistent and elastic source of revenues in the entire state has been provided for public schools.

The second is that since public education is an nonessential function of state government, only the earmarking of funds through a separate fund — the ASETF — has buffered public K-12 schools from the uncertainties surrounding proration of the General Fund. Simply put, the public schools of this state could not have achieved the present successful status, although inadequate, without protection from discriminatory proration. A constitutional guarantee of public education is lacking in Alabama. The existence of the ASETF does provide the appearance of such a constitutional guarantee.

The ASETF and public has naturally come to dominate the activities of the legislature for several reasons. First, because the ASETF has usured the two major tax resources of the state, it represents both the largest continuing and growth revenues of the state. This results in the continual threat of diversion for other purposes. Secondly, no function of state government requires the magnitude of expenditure as does public education. The casting of this expenditure promotes extensive discussion and deliberation as existing and new programs by the various consumers of the ASETF compete for attention. Thirdly, no program of state government has such an impact on so many lives as does public education. The political reality of this impact is expressed through the annual appropriation from the ASETF.

It is for these and other reasons that each session of the legislature tends to devote itself in substantial part to the ASETF and the appropriations therefrom for public education. Tracing the ASETF through these sessions reflects in many ways the politics, policies, and aspirations of Alabama since 1927. Our public policy toward public education has been set in these appropriations. There is no reason to expect any difference in the future.

Supreme Court, U.S.
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CLERK

NO. 95-386

IN THE

Supreme Court Of The United States

OCTOBER TERM 1995

JASON RICHARDS and FANNIE HILL,

Petitioners,

v.

JEFFERSON COUNTY, ALABAMA and BIRMINGHAM-JEFFERSON CIVIC CENTER AUTHORITY

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

REPLY BRIEF ON THE MERITS

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STATEMENT OF THE CASE

There has been no discovery in this action. No depositions have been taken; no interrogatories have been propounded. (R. 1- 429). Hence, our requested relief, in the petition for certiorari granted by this Court, that after reversal of the Alabama Supreme Court's *res judicata* decision "the case be remanded for trial." (Petition for Certiorari, p. 11). Jefferson County, for the first time in its Brief of Respondents, disputes Petitioners' claim that paragraph 1(B) of Ordinance 1120 exempts employees of the businesses it excludes. The ordinance provides: "The words 'vocation, occupation, calling and profession' . . . shall not mean or include . . . businesses, professions or occupations for which license fees are required under . . . Title 40, §§ 40-21-52 [freight lines and equipment companies], 53, 54, 55 [public utilities], 58 [telephone businesses], 59 [telegraph businesses], 60 [express companies], 40-16-6 [financial institutions] and 27-4-9 [insurers]." (Appendix to this brief, p. A-19) The County now claims to have been collecting the tax from "almost all natural persons" employed by these businesses. (Brief of Respondents, p. 17) If so, it is a matter which would logically emerge during discovery. Petitioners cannot, at this point, concede that these employees are properly paying the tax if, in fact, they are.

Submitted herewith, via one last appendix for this Court's consideration, are documents which address Respondents' arguments, in brief, that Petitioners suffer from "an enormity . . of misconception" regarding exemption of insurance companies, express companies, railroads and banks (Brief of Respondents, p. 18); which refute Jefferson County's allegation that if it loses this case it faces a "daunting political challenge" persuading the Alabama Legislature to take simple steps to correct the constitutional deprivations inherent in its occupa-

tional tax exemption scheme (Brief of Respondents, p. 27); and which further refute Jefferson County's claim that "the only sizeable class of natural persons who are not subject to the Occupational Tax comprise the state-regulated professions." (Brief of Respondents, p. 48). These appended documents are: Paragraph 1(B) of the tax itself; a Birmingham Bar Association Memorandum attached to a bill introduced in the Alabama Legislature which, if enacted, would have easily eliminated the exemptions complained of by Richards and Hill; and a pleading filed by federal district judges sitting in Jefferson County which addresses the irrationality of the tax exemption scheme by revealing that "preachers" in the county, though not exempt from the tax, are not required by Jefferson County to pay it.

We respectfully submit that these are but three of many matters addressing the merits of the equal protection claims of Richards and Hill which deserve to be made the subject of discovery, and, thereafter, a judgment in the trial court. Hence, our contention that the posture of this case in this Court is such that it should be reversed on the *res judicata* grounds stated in our Petition, and remanded for a trial upon the merits of Richards' and Hill's federal equal protection claims.

ARGUMENT

RESPONDENTS' HISTORY OF HOW THE EXEMPTION SCHEME BUILT INTO THE JEFFERSON COUNTY OCCUPATIONAL TAX "GOT SO BAD" DOES NOT EXCUSE AN IRRATIONAL DENIAL OF EQUAL PROTECTION TO RICHARDS AND HILL

Following a lengthy and protracted historical apology for how the exemption scheme built into Jefferson County's Occupational Tax became the albatross that it

is, Respondents assert that it should be left undisturbed because: (1) it is an "economic and political snapshot of an essentially rural and undeveloped state prior to World War II" and (2) the County considers it to have harmlessly evolved to accommodate "professions, learned and otherwise" and callings involving "quaint, obsolete or transient activities" beyond its control. (Brief of Respondents, pp. 2-20) This ignores the fact that we now know Jefferson County compounds the facial irrationality of its tax exemption scheme by exempting "preachers" — an odd classification not exempted anywhere on the face of the tax — by simply refusing to collect from them. (Appendix to this Reply Brief, p. A-9). It also ignores simple mathematics. A manicurist pays $5.00 a year to the state for a license, and completely avoids the tax. (Appendix to Brief of Respondents, p. A-57) A veterinarian does likewise, to like effect. (Appendix of Brief of Respondents, p. A-94) A preacher pays nothing. As the bill which would have eliminated the exemptions complained of here makes clear, a deduction only for license fees paid to the county might be a logical method for correcting the federal constitutional deprivations now before this Court, but even then there would be no rational basis for equating license fees paid to the state with occupational tax payments made to the county. License fees paid to the state offer a license holder a measure of exclusivity, lessened competition, and, in some cases, self regulation. License fees are not in any way comparable to tax payments which benefit the County treasury. A similar bill, if enacted, would simply correct the tax exemption imbroglio which is now before this Court.

Respondents candidly admit that the Alabama Legislature was a lobby interest for big business in 1927, when the license scheme which underpins the exemptions here in issue emerged. (Appendix to Brief of Respondents, A-200) The Birmingham Bar Association Memo-

randum appearing in the appendix to this brief proves little has changed since. Today in Alabama, professions which employ lobbyists and those which enjoy exemption from the Jefferson County Occupational Tax are frequently the same. All too often, their interest in enjoying exemption from this tax is effectively balanced against imposition of an irrational burden on citizens like Richards and Hill only by the United States Constitution, and only by this Court.

Respondents raise the issue of legislative corrective action in a footnote, citing this Court's decision in *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989), and shuddering as they speculate upon the possibility of paying a refund of taxes unconstitutionally collected. Shortly after this Court handed down its decisions in *Davis, supra*, a group of Alabama citizens similarly situated to the *Davis* plaintiffs filed suit seeking similar relief. *Sizemore v. Rinehart*, 611 So.2d 1064 (Ala. Civ. App. 1992) writ quashed, 611 So.2d 1064 (Ala. 1993). The taxpayer plaintiffs in *Sizemore* obtained not only a refund for a class of taxpayers situated similarly to Richards and Hill, but also a reasonable and swift amendment, in the Alabama Legislature, to the state statutes which were offensive to this Court's decision in *Davis*. The Alabama Court of Civil Appeals noted with approval the wisdom and dispatch of the Legislature's reaction to *Davis*:

> We note that the amount of refunds due to be paid to the class in this case exceeds $17,700,000. This court is mindful of the impact this amount of refund will have on the state's treasury; however, refusing to follow a decision of the United States Supreme Court would be an act of futility and show a lack of judicial responsibility.
>
> . . .

> We further note that, in response to the *Davis* decision, the Alabama legislature enacted Act No. 90-596 which amended 40-18-19 and 40-18-20, Code 1975, granting a full exemption from Alabama income tax to the members of this class, so that these taxation statutes would not be in violation of 4 U.S.C.A. 111 (West 1985) and the doctrine of intergovernmental tax immunity.
>
> 611 So.2d at 1069

We therefore contend that Jefferson County's claim that "[t]here is simply no way that the county could meet its current governmental responsibilities, while at the same time absorbing the loss of the occupational tax and financing a refund of the cumulative taxes collected and spent since January 1, 1988" is flat wrong. It can do both, expeditiously, by imposing a tax which meets constitutional muster on the many currently exempted occupations described in our petition, or it can exempt all and choose to impose a tax of a wholly different character upon its citizens. But one thing is certain: our legislature knows how to act promptly and efficiently to follow a decision by this Court, as it did in the wake of *Davis v. Michigan Department of Treasury, supra*, and has done on numerous occasions when this Court has made known to Alabama the error of its statutory ways.

HANSBERRY v. LEE, AND *MARTIN v. WILKS* DIRECTLY REFUTE THE *RES JUDICATA* ARGUMENTS MADE IN JEFFERSON COUNTY'S BRIEF

In *Hansberry, supra*, this Court described in terms of notice and an opportunity to be heard, exactly how it handles a *res judicata* issue like the one in this case:

> State courts are free to attach such descriptive labels to litigations before them as they may choose and to attribute to them such consequences as they think appropriate under state constitutions and laws, subject only to the requirements of the Constitution of the United States. But when the judgment of a state court, ascribing to the judgment of another court the binding force of *res judicata*, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes.
>
> 311 U.S. at 40

Jefferson County is well aware that neither Richards nor Hill had any notice or opportunity to be heard upon their federal equal protection claims — or any others, for that matter — when the *Bedingfield* case was tried. Therefore it adopts in brief, three fallback positions, none of which is persuasive. The first it calls "virtual representation . . . pragmatically established." (Brief of Respondents, pp. 29-31) In the second it maintains that what the Alabama Supreme Court really meant to describe in the opinion below was "issue preclusion" (Brief of Respondents, p. 32), and in the third it maintains that a virtual privity concept should somehow be designed to link the *Bedingfield* plaintiffs to Richards and Hill. (Brief of Respondents, p. 33-36) (This third position is Jefferson County's oddest, because it basically seeks reversal of *Martin v. Wilks, supra, sub silentio.*)

No amount of pragmatism can change the fact that three arcane state law issues, and only those three issues,

were heard and decided by the trial and appellate courts in *Bedingfield, supra.* Nothing can change the fact that the *Bedingfield* plaintiffs had never paid the occupational tax, therefore lacking standing to complain about those exempted. Still, Jefferson County cites a few obscure virtual representation cases, omitting reference to the "adequacy of representation" component of each which is missing in this case. In *Southwest Airlines Co. v. Texas Int'l Airlines*, 546 F.2d 84 (5th Cir. 1977) cert. den. 434 U.S. 832 (1977) and *N.A.A.C.P. v. Hunt*, 891 F.2d 1555 (11th Cir. 1990), the Fifth and Eleventh Circuit Courts of Appeals, respectively, held that privity of the stripe urged by Jefferson County exists only where nonparties to a first action were "adequately represented" by the parties in an original action. *Southwest Airlines Co. v. Texas Int'l Airlines*, 546 F.2d, at 100; *N.A.A.C.P. v. Hunt*, 891 F.2d, at 1561. Moreover, the *Southwest Airlines Co.* case involved first case representation by a government authority, and the *N.A.A.C.P.* case involved first and second case representation by a common plaintiff who appeared individually, and as a member of both the N.A.A.C.P. and the Alabama legislature, in both actions. See also, Footnotes 55 and 59, *Southwest Airlines Co., Inc., supra.*

Jefferson County also suggests that the Alabama Supreme Court's decision "would be more defensible" had it reached the same result as a matter of "issue preclusion". In that vein it cites *Grubb v. Public Utilities Commission of Ohio*, 281 U.S. 470 (1930) for the proposition that omitted mention of an issue "distinctly presented" did not, in that case, render that issue undecided. *Grubb* was a case involving a particular bus route excluded from a certificate of authority issued by the Ohio Public Utilities Commission. Unlike the case at bar, it involved an identical plaintiff in both suits, and actual presentation of the exact same constitutional issue in both. This Court's conclusion in *Grubb* ("[A] judgment upon the merits in one

suit is *res judicata* in another *where the parties and subject matter are the same.*" 281 U.S., at 479) (Emphasis supplied) is one with which we have no quarrel. It is simply not applicable to this action involving different parties and a different subject matter in different lawsuits.

The final fallback position pressed by Jefferson County seeks to force privity onto the *Bedingfield* plaintiffs and Richards and Hill by describing both suits as involving "the same public question", and considering the very different claims of Richards and Hill to be nothing more than assertive of an "illusory private right". (Brief of Respondents, pp. 28-29, 32-33) Nothing in the record, or elsewhere, supports this odd contention. Indeed, Alabama Associate Justice Maddox (who was a Justice upon the Alabama Supreme Court when *Bedingfield* was decided) recalls otherwise:

> The trial judge, in denying the defendants' motion for a summary judgment in this case (that motion being based on the ground that the action was barred by the doctrine of *res judicata*), issued an order in which he concluded, in part, that "[i]n *Bedingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988), neither the trial court nor [this Court] determined whether Act No. 406 (Alabama Legislature 1967), authorizing the tax in question, or Jefferson County Ordinance No. 1120 (Jefferson County Commission 1987), imposing the tax in question, violates the equal protection clause of the United States Constitution by creating an unreasonable, unjust, and improper classification of citizens subject to the tax in an arbitrary, irrational and unjust manner." The trial judge also determined that "[i]n *Bedingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988), neither the trial court nor [this Court] determined whether the tax in question violates the Buck Act (4 U.S.C. 111) as it pertains to federal employees." I agree with the trial court on both points.
>
> In concluding that the trial judge was correct, I have examined the pleadings in *Bedingfield* and the order entered by the trial judge in that case and I have studied the opinion issued by this Court in *Bedingfield*, a case in which I participated. I have also carefully considered the argument of Jefferson County that "the claims in this case arise from the same nucleus of operative fact as the claims made in *Bedingfield* and [that] because the evidence necessary to support both claims is *identical*, it is axiomatic that the fourth element of *res judicata* is satisfied," and I have given careful consideration to the views of my colleagues expressed in the majority opinion, and my only comment is that if the "same cause of action presented in both suits" element of the res judicata doctrine is so easily satisfied, then it could be extended ad infinitum and would establish a precedent that could close the courthouse doors to other plaintiffs in other cases who might find themselves faced with the rule of law herein established. I think that the Court is establishing a bad precedent.
>
> My opinion that *Bedingfield* does not bar the claims presented in this case is the same as that of the trial judge: that this Court, in *Bedingfield*, did not adjudicate these claims, or any claims similar to them.
>
> Appendix to Petition, A-8,9

This recollection of the difference between the two actions is particularly instructive here because the majority does not contend otherwise. Petitioners' private class action claims, based on the irrationality of an exemption

scheme built into the tax, were not even similar to the claims adjudicated in *Bedingfield*. Without contradiction from the majority, Justice Maddox places the clear differences between parties and claims in the these two actions directly into the precedential path of *Martin v. Wilks, supra.*

If this Court meant what it said in *Martin*, none of Jefferson County's arguments are persuasive. Conversely, if those arguments here have merit, *Martin* is wrong and due to be reversed. In *Martin*, this Court resolutely held:

> Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree. The parties to a lawsuit presumably know better than anyone else the nature and scope of relief sought in the action, and at whose expense such relief might be granted. It makes sense, therefore, to place on them a burden of bringing in additional parties where such a step is indicated, rather than placing on potential additional parties a duty to intervene when they acquire knowledge of a lawsuit.
>
> 490 U.S. at 765

Richards and Hill, of course, had no notice whatsoever of the case by which the Alabama Supreme Court determined them to be barred, and no opportunity to intervene. Their claims underscore the prescience of this Court's further observation, in *Martin*, that:

> [E]ven under a regime of mandatory intervention, parties who did not have adequate knowledge of the suit would relitigate issues. Additional questions about the adequacy and timeliness of knowledge would inevitably crop up.
>
> 490 U.S. at 768

Indeed, this Court recognized the likelihood of subsequent claims under the equal protection clause of the Fourteenth Amendment in cases involving occupational taxes years before in *Walters v. City of St. Louis, Missouri*, 347 U.S. 231 (1954). There, a municipal income tax ordinance was subjected to this Court's scrutiny because it treated profits of corporations and businesses differently from the wages of individuals. The St. Louis tax was upheld on an issue far removed from the one here — treating the gross receipts of corporations and individuals differently — but the collection status of the tax was similar to that of the Jefferson County Occupational Tax when *Bedingfield* was decided:

> A weakness of the appellants' case is that its anticipatory character precludes consideration of any contentions insofar as they depend upon actual application of the tax or the regulations promulgated for its administration. This action was commenced almost immediately after the Act became effective. A portion of appellants' wages has been withheld by their employer, *but the City has not yet collected the tax.* There is no evidence as to how the amount withheld from appellants compares with taxes collected from self-employed persons or businesses. The complaint attacks only the state legislative Act delegating power to the City of St. Louis and the taxing ordinance enacted by that City. (Emphasis supplied)
>
> 347 U.S. at 233

This failure of collection resulted in a concurring opinion by Justice Douglas, with whom Justice Black joined, regarding an anticipated future challenge, after collection of the tax:

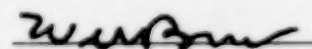
> I am less confident than my Brethren that the Supreme Court of Missouri did not pass on the regulations as well as the ordinance. But I bow to their reading of the record, *saving for a future day the serious and substantial question under the Equal Protection Clause raised by the regulations which grant employers deductions for taxes paid the federal government, yet do not allow employees a deduction for the same tax.* (Emphasis supplied)
>
> 347 U.S. at 238

Jefferson County would, of course, contend that a subsequent challenge by different parties, mounting a different subject matter challenge to the tax (a "future day" question, in the parlance of Justice Douglas), should be barred by *res judicata*. That contention should not be seriously made today, after this Court's decision in *Martin*, because its logic would have left the firefighters in that action without their "own day in court", 490 U.S. 762, and Mr. Hansberry without a right to peacefully occupy his own home. 311 U.S., at 46. The same contention similarly robs Hill and Richards of due process of law by denying them their own day in court.

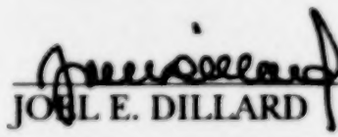
CONCLUSION

The Equal Protection Clause protects Richards and Hill from arbitrary and irrational classifications like the constitutionally obnoxious ones built into the exemption scheme of the Jefferson County Occupational Tax, but only if they, and the class they represent, have a day in court. Richards and Hill come into this Court with a standing which is superior to that of the Birmingham firefighters in *Martin v. Wilks*, for the firefighters at least had notice through their association and local newspapers that a prior case existed. We therefore renew here our petition for reversal of the *res judicata* decision of the Alabama Supreme Court, and remand of this case to the trial court for a decision upon the merits of Jason Richards' and Fannie Hill's federal equal protection claims.

Respectfully submitted,



WILLIAM J. BAXLEY



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APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

JEFFERSON COUNTY, a political subdivision of the State of Alabama,	)	
Appellant,	)	Case No. 94-6400
vs.	)	
WILLIAM ACKER and U. W. CLEMON,	)	
Appellees.	)	

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION CIVIL ACTION NOS. 93-M-0069-S AND 93-M-0196-S

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF BEFORE EN BANC PANEL

Come now James H. Hancock, Robert B. Propst, Edwin L. Nelson, Sharon Lovelace Blackburn and C. Lynwood Smith, Jr., pursuant to Rule 29, Federal Rules of Appellate Procedure, and respectfully move for leave to file *amici curiae* briefs in support of appellees' position before the *en banc* panel in the above-entitled appeal. The interest of movants is that we are Article III judges (as are appellees), whose performance of judicial duties are pur-

portedly subjected to licensing by appellant, Jefferson County, a state political subdivision. We are officers of the United States as that term is defined in Rule 29. Our brief is desirable in order to argue from our perspective how the subject ordinance unfairly discriminates against Article III judges, and effectively taxes and unduly burdens an essential function of the federal government.

We propose to refile a brief previously filed by four of us as *amici curiae* in support of appellees' application for rehearing and suggestion for rehearing *en banc* in the above entitled appeal and also a copy of the brief filed by the appellants in the case of *Richards, et al v. Jefferson County, Ala., et al*, No. 95-386, as to which the Supreme Court of the United States has granted *certiorari*. A copy of each of said proposed briefs is attached hereto.

/s/ James H. Hancock
JAMES H. HANCOCK

/s/ Robert B. PROPST
ROBERT B. PROPST

/s/ Edwin L. Nelson
EDWIN L. NELSON

/s/ Sharon Lovelace Blackburn
SHARON LOVELACE BLACKBURN

/s/ C. Lynwood Smith, Jr.
C. LYNWOOD SMITH, JR.

Proposed *Amici Curiae*

CERTIFICATE OF SERVICE

I, one of the proposed *amici curiae*, hereby certify that I have on this 19th day of January, 1996, mailed a copy of the foregoing by U.S. Mail, postage prepaid, to the following attorneys of record at their addresses of record:

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/s/ Robert B. Propst
ROBERT B. PROPST

IN THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

JEFFERSON COUNTY, a political subdivision of the State of Alabama,	)	
Appellant,	)	
v.	)	Case No. 94-6400
WILLIAM ACKER and U. W. CLEMON,	)	
Appellees.	)	

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION CIVIL ACTION NOS. 93-M-0069-S AND 93-M-0196-S

AMICI CURIAE BRIEF OF JAMES H. HANCOCK, ROBERT B. PROPST, EDWIN L. NELSON AND SHARON LOVELACE BLACKBURN IN SUPPORT OF APPELLEES' APPLICATION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

JAMES H. HANCOCK
ROBERT B. PROPST
EDWIN L. NELSON
SHARON LOVELACE BLACKBURN
1729 - 5th Avenue North
BIRMINGHAM, ALABAMA 35203

PRO SE

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA DIVISION

JEFFERSON COUNTY, a political subdivision of State of Alabama,	)	
Appellant,	)	
v.	)	
	)	CASE NO. 94-6400
WILLIAM ACKER and U. W. CLEMON,	)	
Appellees.	)	

CERTIFICATE OF INTERESTED PERSONS

Amici curiae hereby certify as interested all persons listed in appellees' certificate of interested persons.

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RULES:

Rule 29, F.R.A.P. 2

STATEMENT OF THE ISSUES

1. Whether Ordinance No. 1120 constitutes an income tax?
2. Whether Ordinance No. 1120 unfairly discriminates against federal judges?
3. Whether Ordinance No. 1120 unconstitutionally diminishes the salaries of those Article III judges who were appointed prior to its effective date?

ARGUMENT

Pursuant to Rule 29, Federal Rules of Appellate Procedure, the undersigned, James H. Hancock, Robert B. Propst, Edwin L. Nelson and Sharon Lovelace Blackburn, active judges of the United States District Court for the Northern District of Alabama, being officers of the United States not requiring leave of court under Rule 29 in order to file an *amici curiae* brief, but obviously having a substantial interest in the outcome of this case, respectfully file the following brief *amici* in support of the application for rehearing and suggestion for rehearing *en banc* filed by appellees, William M. Acker, Jr. and U. W. Clemon.

Amici are in total agreement with Judge Moye, with the dissent of Chief Judge Gerald B. Tjoflat, and with appellees' brief on application for rehearing. We want this Honorable Court to understand, contrary to the possible implication contained in the panel's majority opinion, that after Judge Charles Moye's ruling in the lower court, *all* active district judges within the Northern District of Alabama, some of whom had previously paid Jefferson County's occupational license, discontinued paying it, and none have since paid it. We will hereinafter briefly state our reasons, keeping them short in order not to duplicate what has already been said.

Is Ordinance No. 1120 an Income Tax?

The central proposition in the two-judge opinion is that what Jefferson County expressly calls its occupational license is not really an occupational license but an income tax. There are several flaws in the rationale employed by the panel majority in reaching this conclusion.

1. Alabama categorically forbids a county government from enacting an income tax. Jefferson County is not exempted from this express.

2. There would be no purpose in the language of Ordinance 1120 making illegal an activity performed and generating income in Jefferson County unless the intent of the ordinance is to require that the county grant its permission to perform a particular activity before a person can perform that activity in the county.

3. A tax which expressly exempts from its effect every person who holds a state license authorizing him or her to perform his or her occupation, without regard to how small his state license fee is in comparison to the dollar figure required to be paid by assessment of a percentage of income, as here exacted by Jefferson County, the taxing unit, from non-exempt occupations, cannot objectively or fairly be viewed as an income tax.

4. If Ordinance 1120 were a true income tax, clergypersons would be paying it, because Alabama understandably does not issue licenses to members of the clergy, any more than to federal judges. The fact that Jefferson County has chosen not to sue its preachers who fail to pay the license, despite no exemption, must be viewed as a clear concession by Jefferson County that this is not an income tax, because while the First Amendment's anti-establishment clause precludes a government's granting of a license to preach, it does not grant preachers an exemption from income taxation.

5. If Ordinance 1120 were a true income tax, it would not be based on a percentage of the *work* performed in Jefferson County. By its very nature this scheme is geared to the right to work in Jefferson County. Thus, the taxable event as to federal judges is the performance of their duties in Jefferson County, and therefore Jefferson County has effectively taxed an essential function of the federal government.

Does Ordinance No. 1120 Unfairly Discriminate Against Federal Judges?

The panel majority holds that the *"occupational tax does not discriminate against judges, vis-a-vis other professions"* and that the *"slight difference in economic burden does not compel a finding of discrimination."* (emphasis supplied). Slip Op. at p. 3159. We very respectfully point out that *no* "profession" except the judge's profession (if judging is a profession) pays Jefferson County's occupational license. All other professions except the clergy are licensed by the State of Alabama and are therefore exempt from the tax by the express terms of Ordinance 1120. Furthermore, not a dime of the $250 state license fee paid by a highly successful lawyer practicing in Jefferson County goes to Jefferson County, whereas *all* of the $670.00 (.5% of annual salary) claimed of the district judges (whose chambers unfortunately are in Jefferson County) would go to Jefferson County and none to the state. The fact that Jefferson County obtains nothing from resident attorneys and $670.00 from resident federal judges is facially discriminatory. Also, the term "economic burden" is broad enough to require consideration of the time and effort to accomplish the very strict record keeping that will be necessary to prove what is almost, if not entirely, impossible, namely, how much of our income was earned from work performed in one out of 31 countries. Such record keeping, if required, will constitute a very significant "economic burden."

Does Ordinance No. 1120 Unconstitutionally Diminish the Salary of Those Article III Judges Who Were Appointed Prior to Its Effective Date?

It is not only interesting but of great significance that the decision of a trial court cited by Jefferson County in its supplemental submission of January 6, 1994, shortly

before oral argument in this case, has recently been overruled by the appellate court to which it was appealed. In *Hatter v. United States*, — F.3d — (Fed. Cir. 1995), 1995 WL 517506, decided on August 30, 1995, the Court of Appeals for the Federal Circuit not only flatly disagreed with *Hatter v. United States*, 31 Fed. Cl. 436 (1994), but explained why *O'Malley v. Woodrough*, 307 U.S. 277 (1939), a case relied upon by the panel majority in the instant case, is not controlling on the issue here presented. Two of the appellants in *Hatter* are district judges sitting in Georgia, and one sits in Florida. If the Federal Circuit had been dealing with a county occupational license instead of with a Social Security deduction *applicable to every taxpayer*, its task would have been even easier. *Amici* do not want to be understood to be taking the position that the panel opinion in the instant case should not be vacated unless this Court, *en banc*, agrees with the Federal Circuit in *Hatter*, although Judge Moye confidently and correctly predicted the *Hatter* outcome.

CONCLUSION

For the foregoing reasons, and for the others which have already been articulated, the undersigned respectfully suggest that this case is a proper case for *en banc* reconsideration and for the entry of a judgment in favor of appellees and against Jefferson County.

Respectfully submitted

/s/ James H. Hancock
JAMES H. HANCOCK

/s/ Robert B. Propst
ROBERT B. PROPST

/s/ Edwin L. Nelson
EDWIN L. NELSON

/s/ Sharon Lovelace Blackburn
SHARON LOVELACE BLACKBURN

PRO SE

CERTIFICATE OF SERVICE

I, one of the above appearing *amici curiae,* hereby certify that I have on this 20th day of September, 1995, mailed a copy of the foregoing by U.S. Mail, postage prepaid, to the following attorneys of record at their addresses of record:

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/s/ James H. Hancock
JAMES H. HANCOCK

MEMORANDUM

TO: All Members of the Birmingham Bar Association
FROM: Warren B. Lightfoot, President
RE: Proposed increase in Your Taxes

House Bill 527 (enclosed) which has been introduced in the state legislature appears to eliminate lawyers' exemption from the Jefferson County Occupational Tax. Currently, lawyers and others who are required to purchase a license from, or pay a privilege tax to, the State of Alabama or Jefferson County, are exempt from Jefferson County's Occupational tax. This exemption includes accountants, architects, dentists, doctors, engineers, optometrists, real estate agents and brokers, stock brokers, and many others. House Bill 527 would remove that exemption and authorize Jefferson County's governing body to levy a license or privilege tax at the rate of 1/2 of 1% of the annual gross receipts of those formerly exempt tax payers. You may wish to contact your state representative and/or senator concerning this bill. Printed below for your information is a draft of a letter which you may want to use in contacting your state representative or senator.

Since many of your clients may also be affected by this legislation, you may also want to notify them of this legislation so that they may contact their state representative and/or senator. Also printed below is a draft of a letter which you may want to utilize in notifying them of this proposed legislation.

DRAFT LETTER TO REPRESENTATIVE/SENATOR
RE: House Bill 527

The above bill has been brought to may attention. I live in your district, and I want to register my opposition to this bill and state the reason. It is my opinion that a

privilege tax on gross earnings imposed at the county level is not a desirable or appropriate revenue base for Jefferson County. From the perspective of the County, it simply serves to increase the competitive disadvantage the County now suffers relative to surrounding counties, particularly North Shelby County. The effect is to encourage businesses and professionals to locate in, or relocate to, other counties. Furthermore it is highly probable that this tax will be passed on to the consumers through higher fees. It is obvious to me and to many other voters and taxpayers, that this is a short-sighted revenue generating program.

I have an alternative suggestion. I urge you and our other representatives to support comprehensive tax reform, implemented statewide, and to reject band-aid approaches such as this Bill.

DRAFT LETTER TO CLIENTS:

House Bill 527 has been introduced in the state legislature to eliminate certain exemptions from the Jefferson County Occupational Tax. Currently, persons who are required to purchase a license from, or pay a privilege tax to, the State of Alabama or Jefferson County are exempt from Jefferson County's Occupational Tax. This includes accountants, architects, dentists, doctors, engineers, lawyers, optometrists, real estate agents and brokers, stock brokers and many others. House Bill 527 would remove that exemption and authorize Jefferson County's governing body to levy a license or privilege tax at the rate of 1/2 of 1% of the annual gross receipts of those formerly exempt tax payers. Since you will be affected by this legislation either through the loss of the exemption or from increased costs passed on by those who lose the exemption, you may wish to contact your state representative and/or senator concerning this bill. I

have enclosed for your information a draft of a letter which you may wish to use in contacting your state representative and/or senator. If you have any questions concerning this bill, do not hesitate to contact me.

H. 527 By McDowell and McClaim (With Notice and Proof)
R1 4/30/91
RFD Local Legislation No. 2

A BILL TO BE ENTITLED
AN ACT

Relating to Jefferson County, to amend Act No. 406, H. 832, 1967 Regular Session, so as to delete certain exemptions and provide the county commission with authority to levy an occupational tax upon all persons and businesses to limit the amount of such business or privilege tax, and to provide a deduction for other privilege tax paid to the county.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. The Title of Act No. 406, H. 483, 1967 Regular Session is hereby amended to read as follows:

"An act to authorize the governing body of any county of the state having a population of 500,000 or more, according to the last or any subsequent federal census, to levy a business or privilege tax *for revenue purposes* upon any business, vocation, occupation, calling or profession, ~~for which a license or privilege tax is not required for either the State of Alabama or the county by the laws of the State of Alabama~~, and to limit the amount of any such business or privilege tax, *and to provide a deduction from said privilege or license tax for amounts paid to the county pursuant to a state license code and to provide for collection of said tax and penalties for the enforcement thereof.*

Section 2. Sections 3, 4, 5 and 6 of Act No. 406, H. 832, 1967 Regular Session, are hereby amended to read as follows:

"Section 3. The purpose of this ~~Act~~ *act* is to ~~equalize the burden of taxation by authorizing~~ *provide authority to* the county *governing body* to impose a license or privilege tax upon persons *as defined herein for* ~~now~~ engaging in ~~certain~~ businesses ~~without paying any license tax thereon to either the state or county~~ *as defined herein in the county.*"

"Section 4. The governing body of the county is hereby authorized *for revenue purposes* to levy *and collect* a license or privilege tax upon any person for engaging in any business ~~for which he is not required by law to pay any license or privilege tax to either the State of Alabama or the county by any of the following Article 1, Chapter 20, Title 51, Section 176, 177, 178, 180, 182, 183, 184, 186, 429, and 826 in Title 51 of the Code of Alabama of 1940 as amended~~ *in the county and to allow a deduction from said tax for amounts actually paid for the use of the county by such person required for said business pursuant to a state license code or other state, license or privilege tax.*

"When a person is engaged in more than one business for one or more of which a license or privilege tax is required to be paid to the State or the county but for one or more of which no license or privilege tax is required to be paid to the State or county, the county governing body shall have the authority to levy a license or privilege tax upon that business, or those businesses, for engaging in which such persons is not required to pay any license or privilege tax to the State or county."

"Section 5. The tax hereby levied shall be paid to ~~that~~ *the County Director of Revenue or other* officer or employee of the county chargeable with the duty of collecting *State or county* license or privilege taxes ~~payable to the county~~ *who shall have parallel authority to enforce liens and collect said*

tax that is now or hereafter provided to collect the license or privilege taxes of the State and counties by the Code of Alabama or other law or regulation including Title 40, Chapters 1, 12, 29 Code of Alabama 1975. Non-payment of said tax is subject to the same liens, penalties and interest as are provided by law for non-payment of State and county license or privilege taxes including Title 40, Chapters 1, 12, 29, Code of Alabama 1975."

"Section 6. No license or privilege tax levied by the governing body of the county ~~on any persons, for engaging in any~~ *upon the wages or other earnings of any person as an employee of a* business shall be at a rate which is in excess of the rate of ~~license or privilege tax levied by the largest municipality of the county on the same or similar type of business activity~~ *1/2 of 1% of the gross wages or earnings of such employee.*"

Section 3. All laws or parts of laws which conflict with this act are hereby repealed.

Section 4. The provisions of this act are severable. If any part of this act is declared invalid or unconstitutional, such declaration shall not affect the part which remains.

Section 5. This act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

(B) *The words "vocation, occupation, calling and profession" shall mean* and include the doing of any kind of work, the rendering of any kind of personal services, or the holding of any kind of position or job within Jefferson County, Alabama, by any clerk, laborer, tradesman, manager, official or other employee, including any non-resident of Jefferson County who is employed by any employer as defined in this section, where the relationship between the individual performing the services and the person for whom such services are rendered is, as to those services, the legal relationship of employer and employee, including also a partner of a firm or an officer of a firm or corporation, if such partner or officer receives a salary for his personal services rendered in the business of such firm or corporation, *but they shall not mean or include domestic servants employed in private homes and shall not include businesses, professions or occupations for which license fees are required to be paid under any General License Code of the County or to the State of Alabama or the County by any of the following: Chapter 12, Article 2, Title 40; §§40-21-50, 40-21-52, 53, 54 and 55; 40-21-57, 58, 59, and 60; 40-16-6; and 27-4-9 of the Code of Ala. 1975, as amended.*

— Ordinance No. 1120
Jefferson County, Alabama

(7)

No. 95-336

MOTION FILED

FEB 8 1996

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JASON RICHARDS and FANNIE HILL,
Petitioners,

v.

JEFFERSON COUNTY, ALABAMA and BIRMINGHAM-JEFFERSON CIVIC CENTER AUTHORITY,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, NATIONAL LEAGUE OF CITIES, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Pursuant to Rule 37.3 of the Rules of this Court, *amici* respectfully move for leave to file the attached

brief *amicus curiae* in support of respondents. Respondents have consented to the filing of the brief. This motion is made necessary by the failure of petitioners' counsel to respond to repeated requests for consent to the filing.

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. To the extent this case presents the question of whether Jefferson County's occupational tax violates the equal protection clause of the Fourteenth Amendment, it challenges the broad discretion traditionally enjoyed by state and local governments in structuring state and local tax schemes and in creating tax classifications. This issue is of fundamental importance to *amici* who, in formulating tax policy, must weigh numerous and frequently competing considerations.

Since shortly after the ratification of the Fourteenth Amendment, the Court has rejected the notion that the equal protection clause "compel[s] the states to adopt an iron rule of equal taxation" and has recognized that a State "may impose different specific taxes upon different trades and professions." *Bell's Gap R.R. Co. v. Pennsylvania*, 134 U.S. 232, 237 (1890). The Court has reaffirmed these principles in numerous cases and placed the burden on the taxpayer to "negative every conceivable basis which might support" a tax classification. *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 547 (1983) (citation omitted). The preservation of these principles is essential if state and local governments are to adapt their tax systems to ever changing social and economic conditions.

Because this issue is of extraordinary importance to *amici* and their members, *amici* respectfully move for leave to file the attached brief *amicus curiae* in support of respondents.

Respectfully submitted,

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February 1996

QUESTION PRESENTED

Amici will address the following question:

Whether Jefferson County's occupational tax, which exempts persons required to pay license taxes under state law, violates the equal protection clause.

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INTEREST OF THE *AMICI CURIAE*

The interest of the *amici* is set forth in the motion accompanying this brief.

STATEMENT

1. Beginning in 1927, Alabama enacted a series of statutes requiring firms and persons engaged in various businesses, occupations, avocations and professions to obtain licenses and pay license taxes. *See* Ala. Code §§ 40-12-1 *et seq.* Some of these provisions —namely those applicable to persons in regulated professions such as actuaries, auditors and public accountants, *id.* § 40-12-43, architects, *id.* § 40-12-48, attorneys, *id.* § 40-12-49, and medical professionals, *id.* §§ 40-12-126, 40-12-135, 40-12-136, 40-12-155— specifically exempt persons subject to them from the payment of license tax to the county where they practice. Alabama law, however, specifies that unless a licensing statute specifically exempts one from obtaining a county license, a licensee must pay a county license tax which is set at 50 percent of the state tax. *Id.* § 40-12-2(c) & (e).

Because of growing demand for Jefferson County's services, in 1967 the Alabama legislature enacted Act No. 406.[1] *See Bedingfield v. Jefferson County*, 527 So.2d 1270, 1270-71, 1274 (Ala. 1988). Act No. 406 granted counties having a population of 500,000 or greater authority "to levy a license or privilege tax upon any person [or entity] for engaging in any business" which was not already subject to state and/or county license taxes under the various provisions of the Alabama code. 1967 Ala. Acts 406 (reprinted at J.A. 33-34). Shortly thereafter, Jefferson County exercised the authority granted it by Act

[1] Respondent Jefferson County is Alabama's most populous county in both total population and density. *1992 County and City Extra—Annual Metro, City and County Data Book* 36 (Courtenay M. Slater and George E. Hall eds., 1992).

No. 406 to enact a license code requiring persons and firms engaged in various businesses, occupations and professions to obtain licenses and pay a license tax. *See* License Code of Jefferson County, Alabama as amended.

In 1987, the Jefferson County Commission, under the authority of Act No. 406, enacted Ordinance No. 1120. *See Bedingfield*, 527 So.2d at 1270-71. Ordinance No. 1120 imposes an occupational tax of one-half percent on the gross receipts (including salaries, wages, commissions and bonuses) of all natural persons engaging in any "vocation, occupation, calling and profession" within the county. Ordinance No. 1120 §§ 1-2 (reprinted at J.A. 35-37). Ordinance No. 1120, however, excludes from its definition of "vocation, occupation, calling and profession" those "domestic servants employed in private homes" and those "businesses, professions or occupations for which license fees are required to be paid under any General License Code of the County or to the State of Alabama or the County" under the aforementioned provisions of the Alabama code. *Id.* § 1(B) (reprinted at J.A. 35).

2. Petitioners brought this suit challenging the validity of the Jefferson County occupational tax. Petitioners alleged *inter alia* that the tax violated the equal protection clause of the Fourteenth Amendment. *See* J.A. 5-12. Respondent Jefferson County moved for summary judgment on the ground that the suit was barred as *res judicata*. *See id.* at 25. The trial court granted the motion to the extent petitioners' suit sought to relitigate state law questions resolved in an earlier taxpayer suit, *Bedingfield v. Jefferson County*. *Id.* at 105-06. The trial court, however, denied the motion to the extent petitioners'

suit challenged the tax under federal law including the equal protection clause. *Id.* The trial court subsequently certified for interlocutory appeal its denial of summary judgment on petitioners' equal protection claim. *Id.* at 106-09.

On appeal, the Alabama Supreme Court reversed. The court specifically noted that one of the complaints in the *Bedingfield* action had alleged that the tax "constitutes a denial of equal protection in violation of the Fourteenth Amendment . . . . *Said Act exempts professional occupations required by State law to be licensed but does not exempt other professional and nonprofessional occupations.*" J.A. 113. According to the court, "[t]his allegation is the substance of the allegations made in the complaint now before the Court." *Id.* The court thus reasoned that because the claim had been pleaded, "it [wa]s at least true that [it] 'could have been adjudicated'" in the *Bedingfield* action. *Id.* at 114 (citation omitted). Further reasoning that "[t]he taxpayers in the *Bedingfield* action adequately represented the interests of the taxpayers here" and that "the respective taxpayers' interests" were "essentially identical," the court held that the current action was barred by the doctrine of *res judicata*. *Id.* at 115.

SUMMARY OF ARGUMENT

1. This Court has long recognized that the equal protection clause places only a limited restriction on the States' use of tax classifications. The Court has recently reaffirmed that "[i]nherent in the power to tax is the power to discriminate in taxation" and that "[l]egislatures have especially broad latitude in creating tax classifications and distinctions in tax statutes." *Leathers v. Medlock*, 499 U.S. 439, 451

(1991) (citation omitted). In a long line of cases the Court has held that "[a] State may impose different specific taxes upon different trades and professions" and may exempt entire occupations from taxation. *E.g., Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526-27 (1959).

There are sound reasons for the Court's traditional deference to these inherently legislative judgments. In formulating tax policy, legislatures must examine numerous and frequently competing considerations. And in striking the balance between these considerations legislatures must necessarily make value judgments. Thus, unless a tax classification "discriminates invidiously" against a fundamental right or a suspect class, it is valid if it "bear[s] a rational relation to a legitimate governmental purpose." *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 547-48 (1983). The Court has further held that it is the taxpayer's burden "'to negative every conceivable basis which might support'" the classification. *Id.* at 548 (citation omitted).

2. As petitioners concede, the classifications employed in Jefferson County's occupational tax do not implicate fundamental rights or suspect classes. The scheme is paradigmatic economic legislation which is presumptively constitutional. Petitioners' assertion that those occupations which are exempt from the tax "are not fairly different in the workplace" from those occupations which pay it (Pet. Br. 15) only demonstrates their fundamental misunderstanding of the role of courts in reviewing social and economic legislation. The equal protection clause simply makes none of the value judgments which would support judicial invalidation of the legislative judgments made in enacting the tax. The clause does not require the

State to tax different occupations in the same manner. Nor does it require that the burdens of taxation be allocated among occupations in accordance with their relative contributions to society. In short, when a case presents a claim of economic unfairness, "it is not the function of this Court . . . to consider the propriety or justness of the tax." *Tax Comm'rs of Indiana v. Jackson*, 283 U.S. 527, 537 (1931).

There are, moreover, several readily ascertainable bases for the exemptions of those already required to pay license tax under state law. Because licensees already pay license tax to the State and frequently the county, the State could have rationally concluded that subjecting licensees within Jefferson County to additional taxes at the county level would have a deleterious effect on them, especially in relation to licensees in surrounding counties. Or the State could have rationally concluded that granting state licensees an exemption from additional county taxes would ensure within the county the continued availability of both the professional services and the jobs provided by them. State and local governments have a compelling interest in preserving the viability of urban communities. Creating tax exemptions for professionals and businesses located in urban areas is a rational means of furthering this important governmental interest.

ARGUMENT

JEFFERSON COUNTY'S OCCUPATIONAL TAX SATISFIES THE EQUAL PROTECTION CLAUSE

Petitioners' principal equal protection challenge to Jefferson County's occupational tax is that it creates a tax exemption scheme, which they assert "exempts from its levy, collection and payment businesses and vocations or occupations" subject to license tax under state law. *See* Pet. App. 26-27 (Complaint ¶ 14). Petitioners "further complain[] that the net effect, dollarwise, of the occupational tax, [is] an absurdity which allow[s] persons earning hundreds of thousands of dollars a year to completely avoid the tax by paying, individually or through their employers, a small license fee . . . ."[2] Pet. Br. 4. According to petitioners, this exemption scheme renders the tax "unreasonable, arbitrary and irrational" and violates the equal protection clause. *Id.* at 15.

The Court should reject petitioners' equal protection claim. As explained below, the Court has repeatedly rejected arguments similar to those advanced here by petitioners. The tax's exemptions fall well within the range of lawful discretion which state and local governments possess in creating tax classifications.

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[2] Petitioners assert that persons employed by licensed businesses "receive complete exemption from the tax." Pet. Br. 8. Petitioners further maintain that the county "completely exempts, without explanation, all employees of these powerful business interests without requiring licensure, or payments of any kind to the state or county." *Id.* These contentions are erroneous. *See* Respondents' Brief, Statement, Section F.

A. States Have Broad Discretion to Create Tax Classifications Under the Equal Protection Clause

This Court has long recognized that the Fourteenth Amendment's command that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws" does not prohibit all classifications. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992); *see also New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573, 578 (1938). Indeed, in the area of taxation the Court has repeatedly stated that "[i]nherent in the power to tax is the power to discriminate in taxation" and that " '[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes.' " *Leathers v. Medlock*, 499 U.S. 439, 451 (1991) (quoting *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 547 (1983)).

While petitioners ignore that decisions as to whether to tax or exempt particular occupations are fundamentally the province of legislatures, the Court has recognized as much since shortly after the adoption of the Fourteenth Amendment when it rejected the notion that the equal protection clause "compel[s] the states to adopt an iron rule of equal taxation." *See Bell's Gap R.R. Co. v. Pennsylvania*, 134 U.S. 232, 237 (1890). Indeed, as the Court recognized in *Bell's Gap Railroad*, the equal protection clause

> was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rate of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for the payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the state in framing their constitution.

Id. at 237; *see also Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526-27 (1959) ("The State may impose different specific taxes upon different trades and professions.").

Bell's Gap Railroad involved a tax on bonds issued by a corporation and not an occupational tax. Numerous cases demonstrate, however, that the States retain equally broad authority with respect to occupational and license taxes. *See, e.g., Bradley v. City of Richmond*, 227 U.S. 477 (1913); *Quong Wing v. Kirkendall*, 223 U.S. 59 (1912); *Southwestern Oil Co. v. Texas*, 217 U.S. 114 (1910); *Williams v. Fears*, 179 U.S. 270 (1900).

Quong Wing involved an equal protection challenge to a Montana statute which imposed a license tax on persons working in hand laundries but which exempted those working in steam laundries. *See* 223 U.S. at 62. Quong Wing, a hand launderer, argued that the tax violated the equal protection clause because of its "discrimination between the instrumentalities employed in the same business," *id.*, a claim similar to that raised here by petitioner Hill. *See* Pet. Br. 5. The Court rejected this argument, stating:

> A State does not deny the equal protection of the laws merely by adjusting its revenue laws and taxing system in such a way as to favor certain industries or forms of industry. . . . [A] State may carry out a policy, even a policy with which we might disagree. It may make discriminations, if founded on distinctions that we cannot pronounce unreasonable and purely arbitrary. . . . If the State sees fit to encourage steam laundries and discourage hand laundries that is its own affair.

223 U.S. at 62-63 (citations omitted).[3]

In *Southwestern Oil* a Texas statute imposed an occupational tax on wholesale dealers in oil products. *See* 217 U.S. at 115-16. Wholesale dealers in other articles, however, were not subject to the tax. *See id.* at 117-18. A taxpayer challenged the tax under the equal protection clause asserting that "it arbitrarily selects and levies upon the *wholesale* business in [oil products], a tax of from fifty to one hundred times greater than is levied by the state upon wholesale business in other articles." *Id.* In rejecting this challenge the Court observed that the taxpayer's "view gives to the [Fourteenth] Amendment a scope that could not have been contemplated at the time of its adoption." *Id.* at 121. The Court further observed:

> [The statute] is not arbitrary legislation, except in the sense that all legislation is arbitrary. If

[3] *Amici* note that the statute at issue in *Quong Wing* also contained a gender based exemption which would likely be unconstitutional under more recent precedents. *See* 223 U.S. at 62. To the extent *Quong Wing* involved a challenge asserting that the State could not constitutionally discriminate between steam and hand laundries, it remains good law.

> it be within the power of the legislature to enact the statute, then arbitrariness cannot be predicated of it in a court of law. And it cannot be held to be beyond legislative power simply because of its classification of occupations. What were the special reasons or motives inducing the State to adopt the classification of which the Oil Company complains, we do not certainly know. Nor is it important that we should certainly know. It may be that the main purpose of the State was to encourage retail dealing in the particular articles . . . . If the statute had its origin in such a view, we do not perceive that this court can deny the power of the State to proceed on that ground.

Id. at 126.

The Court recently reaffirmed the validity of this venerable and essential rule:

> " 'The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. . . . [T]he passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive dis-

crimination against particular persons and classes.'"

Leathers v. Medlock, 499 U.S. at 451-52 (quoting *Regan*, 461 U.S. at 547-48 (quoting *Madden v. Kentucky*, 309 U.S. 83, 87-88 (1940))).[4]

As the foregoing demonstrates, a State, in creating tax schemes, has broad authority both in determining whether to tax or exempt particular occupations and in setting tax rates. There are sound reasons for the Court's traditional deference to these inherently legislative judgments. In formulating tax policy, legislatures must examine numerous and frequently competing considerations. And in striking the balance between these considerations, legislatures must necessarily make value judgments about their respective social worth.

Thus, unless a tax classification "discriminates invidiously" against a fundamental right or a suspect class, triggering a heightened standard of review, it is valid if it "bear[s] a rational relation to a legitimate governmental purpose." *Regan*, 461 U.S. at

[4] The Court has, of course, repeatedly applied this principle in rejecting taxpayer claims similar to those raised here by petitioners. *See Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973); *Walters v. City of St. Louis*, 347 U.S. 231 (1954); *Independent Warehouses, Inc. v. Scheele*, 331 U.S. 70 (1947); *Casey Baking Co., Inc. v. Virginia*, 313 U.S. 117 (1941); *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937); *A. Magnano Co. v. Hamilton*, 292 U.S. 40 (1934); *Tax Commr's of Indiana v. Jackson*, 283 U.S. 527 (1931); *Ohio Oil Co. v. Conway*, 281 U.S. 146 (1930); *Swiss Oil Corp. v. Shanks*, 273 U.S. 407 (1927); *Heisler v. Thomas Colliery Co.*, 260 U.S. 245 (1922); *Bradley v. City of Richmond*, 227 U.S. 477 (1913); *Brown-Forman Co. v. Kentucky*, 217 U.S. 563 (1910); *Kehrer v. Stewart*, 197 U.S. 60 (1905); *American Sugar Refining Co. v. Louisiana*, 179 U.S. 89 (1900).

547-48; *see also Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973). The Court has further explained that a tax classification subject to rational basis review is valid if it is "reasonably related to the object of the legislation" and "if any state of facts reasonably can be conceived that would sustain it." *New York Rapid Transit*, 303 U.S. at 578; *see also Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 509 (1937).

The Court's cases also make clear that when rational basis review applies, it is not the government's burden to prove the constitutionality of the tax. Rather, it is the taxpayer who bears the heavy burden of showing that the tax is "palpably arbitrary." *Lehnhausen*, 410 U.S. at 360. As the Court explained in *Regan*, "'[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.'" 461 U.S. at 547-48 (quoting *Madden*, 309 U.S. at 87-88).

B. The Jefferson County Occupational Tax Does Not Violate the Equal Protection Clause

In enacting its occupational tax, Jefferson County, in accordance with the state law granting it authority to impose the tax, exempted those occupations which are required to pay a license tax under state law. *See* pp. 2-3 *supra*. The occupational tax's exemptions do not violate the equal protection clause.

As petitioners concede, the classifications employed in Jefferson County's occupational tax scheme do not implicate fundamental rights or suspect classes. *See* Pet. 6. The tax scheme (including its exemptions) is paradigmatic economic legislation which is presumptively constitutional. Notwithstanding petitioners' bald assertion that the scheme's exemptions for

those occupations which are subject to the State's license tax are "unreasonable, arbitrary and irrational," Pet. Br. 15, the exemptions are similar to those upheld by this Court in numerous cases, all of which have escaped petitioners' attention. Adoption of the standard of equal protection review proposed by petitioners would result in the judicial usurpation of value judgments which are properly the province of legislatures. *See, e.g., Carmichael*, 301 U.S. at 509-10.

Indeed, even petitioners' caricature of the Alabama scheme demonstrates their fundamental misunderstanding of the respective roles of courts and legislatures under our Constitution. According to petitioners, "[m]anicurists, mule dealers, fortunetellers and engineers [who are exempted from the tax] are not fairly different in the workplace from teachers, police officers and law firm couriers [who are subject to it]. Doctors, plumbers and collections agents do not contribute anything to the fabric of Jefferson County society or government different from the contributions of secretaries, laborers and federal judges." [5] Pet. Br. 15.

The flaw in this argument is that the equal protection clause makes none of the value judgments which would support judicial invalidation of the legislative judgments made in enacting the tax. The clause does not require equality in taxation of all occupations. *See, e.g., Lehnhausen*, 410 U.S. at 359-60 (quoting *Allied Stores*, 358 U.S. at 526-27); *Bell's Gap Railroad*, 134 U.S. at 237. Nor does it require

[5] It bears noting that, in addition to federal judges, state and county officials (including state judges) are required to pay the Jefferson County occupational tax. *See* Jefferson County Ordinance No. 1120 §§ 1-2 (J.A. 35-37).

that the burdens of taxation be allocated among occupations in accordance with their relative contributions to society. Indeed, it is precisely because the criteria for making such determinations are so debatable that the Constitution leaves these questions to legislatures. *Cf. Lochner v. New York*, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting). Thus, even if it is not sound policy to favor fortunetellers over teachers, "it is not the function of this Court . . . to consider the propriety or justness of the tax . . . or to criticize the public policy which prompted the adoption of the legislation." *Indiana v. Jackson*, 283 U.S. at 537; *see also Walters v. City of St. Louis*, 347 U.S. 231, 237 (1954) ("Our disapproval of the wisdom or fairness of [a tax classification] is not a ground for interference."). Democratic self-governance would, of course, be gravely harmed if courts were to do otherwise. As the Court observed in *Carmichael*, "[o]nly by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function." 301 U.S. at 510.

Accordingly, notwithstanding petitioners' assertion that the occupations subject to and exempt from the tax "are not fairly different," Pet. Br. 15, the Court has consistently recognized that a legislature can rationally conclude that they are. *See, e.g., Walters*, 347 U.S. at 237; *Armour Packing Co. v. Lacy*, 200 U.S. 226, 235 (1906). The Court has also repeatedly made clear that the equal protection clause does not require the State to tax different occupations in the same manner. *Id.* As the Court has consistently observed, "the State has the right to classify occupations and to impose different taxes upon different occupations." *Kehrer*, 197 U.S. at 69.

Thus, even to the extent the Jefferson County tax scheme may result in disparities between the tax burdens of persons required to pay the occupational tax and those who escape it (because they pay license taxes), the equal protection clause provides no basis for invalidating it. *See, e.g., Southwestern Oil*, 217 U.S. at 121-27.[6] While the burden remains on petitioners to "negative every conceivable basis which might support" the tax, *Regan*, 461 U.S. at 547-48, there are several readily ascertainable bases for the exemptions at issue here.

As the Court has repeatedly recognized, a State has a legitimate interest in promoting what it conceives to be socially beneficial enterprises and occupations. *See, e.g., Carmichael*, 301 U.S. at 512. And the Court has further recognized that granting a tax exemption is a rational means of promoting such occupations. *See id.* In a similar vein, because state licensees already pay taxes to the State and county, the Alabama legislature could rationally conclude that subjecting licensees within Jefferson County to additional taxes at the county level would have a deleterious effect on them, especially in relation to licensees in the surrounding counties.

Moreover, the State could rationally have concluded that granting a tax exemption to state licensees would ensure the continued availability within the county of important professional services as well as the jobs provided by both business and professional licensees. States and local governments have a compelling interest in preserving the viability of urban

[6] More recently the Court in *Nordlinger* rejected an equal protection clause challenge to California's property tax assessment scheme notwithstanding evidence that it resulted in new owners paying tax at an amount seventeen times greater than the tax paid by the previous owner. *See infra* p. 17.

communities. Granting tax exemptions for professionals and businesses located in urban areas is a rational means of accomplishing this important governmental interest.

The Court has also recognized that a State has a legitimate interest in protecting taxpayers' reliance and expectation interests. As the Court acknowledged in *Nordlinger*, " 'The protection of reasonable reliance interests is not only a legitimate governmental objective: it provides an exceedingly persuasive justification.' " 505 U.S. at 13 (quoting *Heckler v. Mathews*, 465 U.S. 728, 746 (1984)). The *Nordlinger* Court also noted that "classifications serving to protect legitimate expectation and reliance interests do not deny equal protection of the laws." *Id.*

In *Nordlinger* the Court upheld California's property tax assessment scheme which capped increases in assessments for those who remained in their homes while assessing at market value newly constructed and newly purchased homes. 505 U.S. at 5-6. The scheme eventually produced substantial disparities between the tax burdens of newer and older owners; the evidence demonstrated that in some instances the bill of a new owner was 17 times the old owner's last bill. *Id.* at 7 & n.2. The Court nonetheless upheld the scheme because it was rationally related to California's legitimate interest in protecting the reliance and expectation interests of existing owners in not having to pay higher taxes. *Id.* at 12-14.

Here, it is equally conceivable that the Alabama legislature exempted those persons paying state license fees from Jefferson County's occupational tax for similar reasons. Alabama's license fees were enacted during a prolonged period of state fiscal and economic crisis; these occupations provided support to the State for more than thirty years before Jeffer-

son County was granted authority to levy its occupational tax. In granting Jefferson County occupational taxing authority, the Alabama legislature could have rationally concluded that because state licensees had borne the cost of government for numerous years during which other occupations (including those whose members are party to this suit) had paid no analogous tax, state licensees had developed reliance and expectation interests in not being subject to additional occupational taxes. Because it is clearly a legitimate state interest to protect the reliance and expectation interests of particular classes of taxpayers, and the classification employed—exempting those who pay license fees from the county occupational tax—is reasonably related to this interest, the exemption is constitutional.[7]

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[7] Petitioner Hill also contends that the occupational tax violates the equal protection clause because it taxes her as "a domestic servant privately employed in commercial buildings" while it exempts "domestic servants employed in private homes." J.A. 2, 7 (Complaint at ¶¶ 2, 14). The Court has long recognized, however, that a legislature can rationally conclude that there are differences between these occupations requiring different tax treatment. *See, e.g., Quong Wing*, 223 U.S. at 62-63.

Most particularly, in *Carmichael*, which involved an equal protection challenge to an unemployment compensation tax assessed against employers, the Court specifically upheld a tax classification which excluded from its definition of employment "[d]omestic service in a private home." *See* 301 U.S. at 505 n.1. In *Carmichael*, an employer challenged the tax on the ground that it was arbitrary to require it to pay the tax while exempting, *inter alia*, employers of servants in private homes. *Id.* at 512. The Court rejected this argument, reasoning that "[r]elatively great expense and inconvenience of collection may justify the exemption from taxation of domestic employers . . . ." *Id.* at 513.

The avoidance of the administrative expense of collecting its occupational tax likewise provides a rational basis for

The foregoing is not intended to be an all inclusive discussion of the rational bases which support the tax. But as it shows, there are several conceivable states of facts which demonstrate its constitutionality. For the purpose of judicial review, it does not matter whether any of these factual scenarios is supported by a legislative record. As the Court has noted:

> A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution. In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions, it was not aware of facts which afford reasonable basis for its action.

Carmichael, 301 U.S. at 510; *see also Southwestern Oil*, 217 U.S. at 121-27.

A legion of precedents recognizes that the democratic process is the proper forum for redressing grievances which are premised on the putative economic unfairness of a tax.[8] Petitioners present no reason to depart from this principle.

Jefferson County's decision to exempt domestic servants employed in private homes.

[8] While petitioners have ignored the numerous precedents which refute their claim, they cite several cases in which the Court has applied rational basis review to invalidate state laws. None of these cases, however, supports the far reaching result which petitioners seek—the transformation of judicial review of social and economic legislation from a process in which courts defer to the value judgments of legislatures to one in which courts impose their own.

The tax scheme at issue here simply does not implicate any illegitimate state interest. Alabama and Jefferson County

CONCLUSION

The judgment of the Alabama Supreme Court should be affirmed.

Respectfully submitted,

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have not classified—either by subjecting to, or exempting from tax—any category of persons on the basis of date of residency in the State. Thus, petitioners' reliance on cases such as *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985), and *Zobel v. Williams*, 457 U.S. 55 (1982), is misplaced. Nor does the tax scheme classify on the basis of State of residency. Thus, petitioners' reliance on *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985), and *WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117 (1968), is likewise misplaced.

Nor is petitioners' reliance on *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster Cty.*, 488 U.S. 336 (1989), any more availing. In *Allegheny Pittsburgh*, the State had adopted a policy in its constitution that all real property was taxable at a uniform rate according to its estimated market value. *See* 488 U.S. at 338. The assessor's intentional systematic undervaluation of property which had not been recently sold was thus an irrational means of carrying out the State's adopted policy of taxing at the estimated market value. *See id.* at 345-46. Here, in contrast, Alabama has not adopted a policy requiring the uniform taxation of all persons, whether they be payers of state license fees or the county tax. *Cf. Nordlinger*, 505 U.S. at 14-15. *Allegheny Pittsburgh* thus does not support petitioners' claim.